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H.R. 849

HEARING

BEFORE THE

SUBCOMMITTEE ON THE LEGISLATIVE PROCESS

OF THE

COMMITTEE ON RULES
HOUSE OF REPRESENTATIVES

ONE HUNDRED FIRST CONGRESS

FIRST SESSION

ON

H.R. 849

A BILL TO CLARIFY THE LAW SURROUNDING THE PRESIDENT'S USE OF THE POCKET VETO

JULY 26, 1989

Printed for the use of the Committee on Rules

U.S. GOVERNMENT PRINTING OFFICE

22-756 WASHINGTON : 1989

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H681-1

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H.R. 849

WEDNESDAY, JULY 26, 1989

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON THE LEGISLATIVE PROCESS,
COMMITTEE ON RULES,
Washington, DC.

The subcommittee met, pursuant to notice, at 10 a.m., in room H-313, the Capitol, Hon. Butler Derrick (chairman of the subcommittee) presiding.

Present: Representatives Derrick, Frost, Wheat, Gordon, Moakley, Martin, and Pashayan.

Chairman DERRICK. We will get started. We are expecting some other members.

I would like to call the first panelist: Prof. Robert Spitzer, chairman of the department of political science, State University College, Cortland, NY, author of "The Presidential Veto."

Our second panelist is Dr. Louis Fisher, senior specialist in American National Government with the Government Division, Congressional Research Service, Library of Congress.

We will start with you gentlemen after I make my opening statement.

OPENING STATEMENT OF HON. BUTLER DERRICK, CHAIRMAN OF THE SUBCOMMITTEE ON THE LEGISLATIVE PROCESS

Chairman DERRICK. Ladies and gentlemen, good morning. I am delighted to convene this hearing of the Subcommittee on the Legislative Process. Today we meet for the purpose of taking testimony on H.R. 849, a bill to clarify the law surrounding the President's use of the pocket veto.

For many years Congress and the executive branch have been at a standoff over the so-called pocket veto. The most recent skirmish in this conflict began on November 30, 1983, during the adjournment between the first and second sessions of the 98th Congress, when President Reagan chose to withhold his approval of H.R. 4042 and assert that he had "pocket-vetoed" the bill.

This legislation sought to extend, for fiscal year 1984, the human-rights certification restrictions of the International Security and Development Cooperation Act of 1981. The legislation enjoyed broad, bipartisan support in the House and the Senate, having passed both Houses by voice vote. Five weeks later, 33 individual Members of the House, led by Michael Barnes, filed suit in the U.S. district court, seeking to overturn the President's action as constitutionally invalid and to compel publication of H.R. 4042 as a

public law. The entire U.S. Senate and the Speaker and the bipartisan leadership of the House later joined the suit.

This skirmish represents merely the latest episode in a long-running conflict between Congress and the executive branch. The conflict arises because the "veto clause" of the Constitution, article I, section 7, clause 2, is ambiguous in one key respect. Today this subcommittee considers legislation to clarify this ambiguity once and for all.

When establishing the Presidential veto, the Framers of the Constitution provided that:

> Every bill which shall have passed the House of Representatives and Senate, shall, before it becomes a law, be presented to the President of the United States; If he approves he shall sign it, but if not he shall return it, with his objections to that House in which it shall have originated, who shall enter the objections at large on their Journal, and proceed to reconsider it. If after such reconsideration two-thirds of that House shall agree to pass the bill, it shall be sent, together with the objections, to the other House, by which it shall likewise be reconsidered, and if approved by two-thirds of that House, it shall become a law . . . *If any bill shall not be returned by the President within 10 days (Sundays excepted) after it shall have been presented to him, the same shall be a Law, in like manner as if he had signed it, unless the Congress by their adjournment prevent its return, in which case it shall not be a law. (Emphasis added.)*

The pocket veto controversy arises because this language in the Constitution no where defines which adjournments "prevent" the President from returning bills to their Houses of origin, and which do not. However, the distinction is crucial, both legally and politically, because when an adjournment "prevents" the return of a bill and the pocket veto applies, then Congress has no opportunity to override; the President's veto is absolute. In other words, the President has "the last word" on the legislation.

The debates of the Framers at the Constitutional Convention in 1787 do not mention what we now refer to as the "pocket veto." However, the Framers did consider and twice reject proposals to give the President an absolute veto over acts of Congress, opting instead to give the Chief Executive a limited, or "qualified" veto subject to override by two-thirds of each House. Since it is clear the Framers did not want the President to have an absolute veto, I believe we may reasonably conclude that the Framers intended the pocket veto to have limited application.

Yet a broad interpretation of which adjournments prevent the return of a bill frequently provides the President with just the absolute veto which the Framers rejected in Philadelphia. Therefore, the question remains which adjournments "prevent" the return of a bill, and which do not.

The Supreme Court has addressed the pocket veto issue twice. In its first encounter with the pocket veto, in the *Pocket Veto* case, 279 U.S. 655 (1929), the Court upheld a pocket veto between the first and second sessions of the 69th Congress. The Court stressed the potential for public uncertainty about the bill's status during the lengthy adjournments which were then common, and speculated that delivery of a vetoed bill to an agent would not satisfy the Constitution.

However, in its 1938 opinion in *Wright* v. *United States,* 302 U.S. 583, the court upheld a veto of a private claims bill returned to the Senate during a 3-day intrasession recess of that body only. The

Court held that no opportunity for a pocket veto arises when, on the 10th day after presentment, the House of origin is in an adjournment of 3 days or fewer and an agent is available to receive the veto message. These two cases, when read together, seem to contradict one another, leaving the law murky.

In 1974, the U.S. Court of Appeals for the District of Columbia Circuit addressed this issue in a case brought by Senator Edward M. Kennedy (*Kennedy* v. *Sampson,* 511 F.2d 430). The appellate court, relying on the Supreme Court's opinion in *Wright,* struck down the pocket veto during intrasession adjournments of any duration where Congress made appropriate arrangements for receipt of veto messages. The Ford administration, relying on the advice of Solicitor General Robert Bork, declined to appeal the decision to the Supreme Court, because Bork believed the administration would lose as the decision was correct on the merits.

Finally, in 1985, the court in *Barnes* v. *Kline* struck down the pocket veto when used during brief, modern intersession adjournments where the Houses of Congress had made arrangements for the receipt of veto messages. The Reagan administration appealed, and in January 1987 the Supreme Court reversed the court of appeals and dismissed the suit as moot, saying that since the law in question applied only to fiscal year 1984, even had it been signed it would have by then expired. The Court's action in reversing the appellate court and dismissing the case leaves the cases law as it had developed prior to the *Barnes* case—unclear, at least with regard to the intersession pocket veto. Without a private or congressional plaintiff challenging a pocket veto, a Supreme Court decision settling the issue is unlikely anytime soon.

The legislation before the subcommittee today, H.R. 849, would codify Congress' interpretation of current law in this area by specifying that no adjournment, other than a final, sine die adjournment to end a Congress, prevents the return of a bill by the President. The bill also proposes to amend the Rules of the House to require the Clerk to notify the Speaker in writing whenever the 10 days for Presidential action have elapsed and a bill has been neither returned nor signed into law.

In my view and that of most commentators, only when Congress adjourns its final session and its Members disperse without the intention to meet again does an opportunity for a pocket veto arise. I believe the Framers intended that in all cases where it is possible the Congress which passed the vetoed act should have the opportunity to consider a veto message, and if it can muster two-thirds of each House, to override the veto. In other words, Congress should have "the last word" whenever it will meet again and can consider a veto message. Anything less upsets the delicate system of checks and balances so carefully crafted in Philadelphia. Congress should settle this issue once and for all; H.R. 849 would do just that.

Without objection, the Chair wishes to place in the record the text of H.R. 849 and article I, section 7, clause 2 of the Constitution of the United States, at this point.

[The two articles referred to follow:]

I

101ST CONGRESS
1ST SESSION

H. R. 849

To amend title 1 of the United States Code to define the type of adjournment that prevents the return of a bill by the President, and to amend the Rules of the House of Representatives to require the Clerk to make certain notifications to the Speaker.

IN THE HOUSE OF REPRESENTATIVES

FEBRUARY 6, 1989

Mr. DERRICK introduced the following bill; which was referred jointly to the Committees on the Judiciary and Rules

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A BILL

To amend title 1 of the United States Code to define the type of adjournment that prevents the return of a bill by the President, and to amend the Rules of the House of Representatives to require the Clerk to make certain notifications to the Speaker.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. AMENDMENT TO TITLE 1, UNITED STATES CODE.

Chapter 2 of title 1 of the United States Code is amended by inserting at the end thereof the following new section:

"§ 115. Adjournment preventing return of bill

"No adjournment of either House of Congress, other than an adjournment sine die to end a Congress, prevents the return of a bill by the President.".

SEC. 2. CLERICAL AMENDMENT.

The table of sections at the beginning of chapter 2 of title 1 of the United States Code is amended by inserting at the end thereof the following new item:

"115. Adjournment preventing return of bill.".

SEC. 3. AMENDMENT OF THE RULES OF THE HOUSE OF REPRESENTATIVES.

Clause 5 of rule III of the Rules of the House of Representatives is amended by inserting at the end thereof the following: "Whenever the Clerk becomes aware that a bill has been presented to the President and that ten days (Sundays excepted) have passed and the bill has not been signed or returned, the Clerk shall notify the Speaker in writing.".

○

CONSTITUTION OF THE UNITED STATES

Article I, Section 7, Clause 2

[2] Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law. But in all such Cases the Votes of both Houses shall be determined by yeas and Nays, and the Names of the Persons voting for and against the Bill shall be entered on the Journal of each House respectively. If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law.

Chairman DERRICK. We are privileged to have with us today a number of very distinguished witnesses to advise us on the merits of this legislation. We certainly look forward to hearing their views.

Do you have a statement?

Mrs. MARTIN. No.

Mr. WHEAT. No, thank you, Mr. Chairman.

Chairman DERRICK. OK. We will start with panel 1 here.

Professor Spitzer, if you will begin.

STATEMENT OF ROBERT J. SPITZER, CHAIRMAN, DEPARTMENT OF POLITICAL SCIENCE, STATE UNIVERSITY COLLEGE, CORTLAND, NY

Mr. SPITZER. Good morning. It is a pleasure to be here.

In my written testimony, Mr. Chairman, I presented perhaps more information about the pocket veto than your committee sought, but consideration of the Founders' intentions, history and evolution of the pocket veto power, and discussion of pertinent court cases all point to the conclusions that: the pocket veto should now be limited to sine die adjournments; that Congress has the right to do so based squarely on article I, section 8 of the Constitution, the necessary and proper clause in particular; and that to do so does not represent an undue or inappropriate encroachment on Presidential powers and prerogatives.

These conclusions derive from several observations about the pocket veto and I would like to summarize them.

One, the Constitution's bias in favor of the regular veto over the pocket veto is clear. Given the Constitution's and the Framers' emphasis on the return of vetoed bills to Congress for a final round of consideration and the Founders' rejection of the absolute veto, as you pointed out, the pocket veto only makes sense in the modern era during sine die adjournments when bill return is impossible or impractical.

It is important to remember that the pocket veto was included only to protect the President from possible attempts by Congress to thwart a veto by passing a bill the President opposed, and adjourning to avoid a veto since there could be no return. If the President can return the bill, then that mechanism is preferred. The pocket veto is only triggered when Congress, by their adjournment, prevents return of a bill.

It is also important to emphasize that the choice we are discussing is not between the pocket veto and no veto, but between the pocket veto and the regular or return veto. There is no danger here of pushing the pocket veto out of existence since it will always be appropriate at the end of a Congress.

The seduction of an expansive interpretation of the pocket veto is that of course it avoids an override fight and therefore guarantees short-term success for the President as well as making his lot a little less complicated, but it is important to remember, also, that the structure of the Constitution, and in particular the legislative process, does not hold ease and efficiency as its principal values. These traits are important, but they cannot or should not supersede overarching constitutional principles—in this instance, the

principle is to ensure a final review of vetoed bills, if possible, which is a trait that is fully embodied in the revisionary nature of the veto power. That is something I discuss at some length in my book.

The second point I would make is the potency of the regular veto. I think it is important to remind ourselves that 93 percent of all regular vetoes have been upheld, sustained. And the return veto is therefore an efficacious power for the President, as is the President's veto threat.

Third, the maturation of Congress, given year-round sessions of Congress, improved means of transportation and communication, and the well-accepted use of legally designated agents by both Congress and the President to receive bills and conduct other business, all contribute to the conclusion that vetoed bills can be easily and reliably returned to Congress.

Law aside, the Presidencies of Ford and Carter made clear the principle of limiting the pocket veto to sine die adjournments is eminently workable and reasonable.

Fourth, the legislative remedy proposed in H.R. 849 is consistent with the thrust of the few court cases that have addressed this subject, including the *Pocket Veto* case which itself emphasized the values of adequate time for Presidential consideration of bills, timely return of bills to Congress, and avoidance of circumstances where bills might be somehow held in limbo for weeks or even months.

The subsequent cases of *Wright* v. *United States, Kennedy* v. *Sampson,* and even *Burke* v. *Barnes* pave a path leading directly to H.R. 849.

Finally, the concept of adjournment and its definition is a quintessentially legislative matter. It is I believe entirely appropriate that Congress act to resolve this longstanding ambiguity.

I would be happy to answer any questions.

Chairman DERRICK. Thank you very much.

[Mr. Spitzer's prepared statement follows:]

THE POCKET VETO AND SINE DIE ADJOURNMENTS

Testimony presented to the Subcommittee on the Legislative Process, Committee on Rules House of Representatives, July 26, 1989

Robert J. Spitzer
State University of New York, College at Cortland
Member, New York State Bicentennial Commission on the U.S. Constitution*

*The views expressed here are those of the author, and not necessarily those of SUNY Cortland or the New York State Bicentennial Commission.

I am pleased to have the opportunity to offer this testimony on H.R. 849. My research on the president's veto power (Spitzer, 1988) has led me to the conclusion that a legislative remedy to the ambiguities surrounding the president's pocket veto power is both necessary and appropriate. Indeed, this conclusion about the pocket veto has been reflected in several congressional studies and reports. A 1951 report (Zinn: 30) to the House Judiciary Committee observed that "Legislation defining the term 'adjournment' would be a worth-while contribution toward eliminating confusion with regard to the application of the constitutional provision."

The esteemed late chair of the House Judiciary Committee, Emanuel Celler, asserted that in his opinion, "the time is long overdue for legislative implementation of the provisions of the Constitution dealing with the exercise of the pocket veto" (Subcommittee No. 5, 1971: 10). Similar sentiments were expressed by the late Senator and constitutionalist Sam Ervin (Subcommittee on Separation of Powers, 1971: 1-3).

This testimony will draw on my research on the pocket veto, incorporating what is known about the concerns that gave rise to this power, its history, and pertinent court cases. Congressional authority to take appropriate action finds its foundation in Article I, Section 8, where Congress is granted the power "To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."

How the Pocket Veto Works

There is no little irony in the fact that, after the exercise of over 1000 pocket vetoes during a period of over 180 years, ambiguity has persisted as to when and under what circumstances the pocket veto may be properly applied. It is important to understand first that the pocket veto is "in an entirely different category from the ordinary veto" (Zinn, 1951: 29). The relevant sentence in the Constitution (Article I, Section 7) is deceptively simple. "If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law." The first part of the sentence refers to the fact that, if the president takes no action on bills presented to him, they become law automatically after ten days. The necessity of this is evident, since without such a qualification the president could halt bills at any time simply by withholding his signature. This circumstance is modified by the phrase, "unless the Congress by their adjournment prevent its return," in which case any bill not signed is vetoed, although not returned to Congress for reconsideration. Any such bills are, in effect, absolute-vetoed by the president. Under these circumstances, members of Congress wishing to reconsider a pocket-vetoed bill must begin at the next meeting of Congress by reintroducing the bill to replicate the process of passage.

The Intentions of the Founders

The pocket veto power raises an immediate, intriguing question--did the founders realize the consequences of this sentence? This question acquires

greater significance with the realization that the founders considered on several occasions a proposal to grant the president an absolute veto, yet voted unanimously on each occasion against it (Spitzer, 1988: 11-13). An absolute veto resembled too closely the despised veto power of the British monarch (see Federalist #69, 1961: 416-17). What, then, was the purpose of this absolute veto?

Looking back at the Records of the Federal Convention, one finds no debate on the subject. Yet several clues illuminate the paradox. First, the one important difference between the federal veto, and that in the New York Constitution of 1777 (after which the federal veto was patterned), is that the latter called for bills vetoed by the governor to be held over until the legislature reconvened. This was changed in the federal Constitution because it was feared that Congress might try to avoid a veto by simply adjourning, thereby preventing timely return of bills to Congress. Without this return, there is no veto. This concern over presidential self-protection was the motivating force behind the pocket veto (Story, 1987: 324-25). In other words, it was conceived as a defense shield to insure that the president would not be deprived of the opportunity to disapprove legislation, not as an affirmative grant of power to the president (e.g., see Barnes v. Kline, 759 F2d 21 (1985): 38). There is no reason to believe that the founders did not understand the implications of what they were doing.[1] At the same time, it is logical to assume that they would not be sanguine about prolific presidential use of an absolute veto.

Evolution of the Pocket Veto

The pocket veto was used sparingly up until the post-Civil-War era (although the same was true of the regular veto; see Appendix). While some

of the circumstances of regular veto use were hotly debated, the power itself was not questioned. The same cannot be said of the pocket veto, however.

The first two pocket vetoes, exercised by President Madison in 1812 and 1816, garnered relatively little notice, and even less controversy. The next president to use the pocket veto was Andrew Jackson (the term "pocket veto" was apparently coined during his administration by his critics; see Vose (1964): 398), who applied it in seven of his twelve vetoes. Jackson's critics raged that the express purpose of the pocket veto was to "guard against a sudden adjournment, by which the President might be deprived of due time to deliberate on an important bill. . . ." Since the congressional adjournment precipitating the particular pocket vetoes in question was not such a sudden adjournment, Jackson's "withholding the bill was arbitrary and unconstitutional" according to one critic, as "Congress and the Senate. . . were deprived of their constitutional right of passing on the bill, after the President had exercised his powers" (Debates in Congress, December 5, 1833: 18).

The aged James Madison, writing to Jackson critic Henry Clay in 1833, voiced similar misgivings about use of the pocket veto. He suggested that applying a pocket veto to a bill "of sufficient magnitude. . .might doubtless be a ground for impeachment." This rather extreme conclusion, coming ironically from the first president to use the pocket, was provoked by the importance he attached to two key components of the legislative process: one, that the president have "adequate time to consider the bills," and two, "that Congress should have time to consider and overrule the objections." For either side to slight attention to the other would

constitute "an abuse for which it would be responsible under the forms of the Constitution" (Watson, 1910, I: 365-66, n.39).

President Buchanan issued a strong defense of the pocket veto's necessity in an 1860 pocket veto memorandum, invoking what was indeed a serious problem attendant to the rush of legislation at the end of a session. "To require him [the president] to approve a bill when it is impossible he could examine into its merits would be to deprive him of the exercise of his constitutional discretion and convert him into a mere register of the decrees of Congress" (Messages, 1913, IV: 3130-31). This argument was, of course, predicated on the circumstance when the president had only the pocket veto at his disposal.

Criticism of the pocket veto persisted. As essay on the veto power that otherwise defended it said of the pocket veto that it was ". . .a kind of bastard veto. . .which is plainly an abuse, unauthorized by the Constitution, and an invasion of the rights of the people and of their representatives" (Long, 1887: 260-61). Long's specific objection lay with the circumstance where a pocket veto was applied not because the president was literally unable to return the bill due to hasty adjournment or a flood of legislation requiring too much time to evaluate, but because the president simply decided to rely on the pocket veto because the bill reached his desk within 10 days of congressional adjournment. While this complaint may merit some attention, the Constitution makes no allowance for the intent behind veto use (as Long also noted).

Persisting Pocket Veto Ambiguities

Although the pocket veto power itself is now unequivocally accepted (its use escalated along with that of the regular veto), several questions

related to its use remain unresolved. One key question is that of adjournment. Given that the Constitution allows for a pocket veto after congressional adjournment, what exactly constitutes an adjournment? Also, may the president approve bills after Congress has adjourned? May representatives of Congress and the president serve as legal "stand-ins" to, for example, receive enrolled bills and veto messages? Presidents are obliged to provide written messages of explanation for regular vetoes, but are they obliged to do the same for pocket vetoes? Is two-thirds of a quorum, as opposed to two-thirds of all members, all that is required for a successful veto override? Some of these questions have been resolved by court rulings, others by accommodation. But the key point is simply that the Constitution provides no obvious answer to these questions. The founders, after all, created a government in the Constitution, not a web of administrative rules and regulations. Court decisions have helped resolve some of these matters.

Court cases and the pocket veto. A handful of Supreme Court rulings have addressed ambiguities concerning the veto power, generally pertaining to the veto around adjournment time. The first case was that of La Abra Silver Mining Co. v. U.S. (175 U.S. 423) rendered in 1899. The case involved the question of whether a bill, duly passed by Congress but signed into law by the president after Congress had recessed (to reconvene at a later set date), was in fact a law, given that the signing occurred after Congress was no longer in session. Speaking for the Court, Justice Harlan argued that such an approval was legal, since it occurred within the 10 day period. The Court rejected the contention that the president could not sign bills when Congress was not in session, despite the Court's recognition that

the president was participating in a legislative act. The matter of signing bills after an adjournment is pertinent to this discussion for two reasons. First, the prevailing sentiment (and practice) up to this time was that the president did not have this power (e.g., Renick, 1898; Rogers, 1920). Second, to be able to sign bills after adjournment (now the accepted practice) helped buttress the pocket veto power, since such bills would be automatically vetoed lacking presidential signature. Presidents avoided these problems for the first 150 years of the country's history by traveling to the Capitol on the last day of a congressional session to sign those bills that were not to be vetoed (Zinn, 1951: 19). The very fact that this practice was the norm is a clear indication that the founders placed great store in allowing Congress every opportunity to react to final presidential actions, including vetoes, before concluding its business (Renick, 1898: 13).

An unusual case illustrating this relationship arose in 1824. By accident, President Monroe had omitted his signature from one out of about 50 bills passed and signed on the last day of the congressional session. Monroe called his cabinet together to discuss the problem. Attorney General Wirt suggested that the bill might be simply signed and back-dated. Secretary of State John Quincy Adams suggested that there was no prohibition preventing the president from signing the bill after adjournment. Secretary of War Calhoun dissented from both propositions. Monroe decided that the bill could not be considered a law, fearing "misapprehensions of [the president's] motives" (Renick, 1898: 209). In 1863, President Lincoln finally set the precedent of signing bills after Congress had adjourned

(although Congress later objected, and re-passed the bill in question the following session).

President Grant offered his own remedy by proposing a constitutional amendment forbidding Congress from passing any laws during the final 24 hours of its session, except vetoed bills, to provide the president with a greater opportunity to examine them (Harrison, 1897: 131). President Cleveland became the first president to refuse to travel to the Capitol during the final days of the congressional session.

The next case, also the most well known, is The Pocket Veto Case (1929; 279 U.S. 744).[2] The case came about as the result of a challenge to a pocket veto by President Coolidge. The veto occurred at the end of the first session of Congress, at the start of an adjournment running from July to December, 1926. Speaking for the Court, Justice Sanford noted first that the specific question was whether the congressional adjournment had prevented the president from returning the bill in question (an Indian tribes claim bill) to Congress within ten days. The court noted the time problem faced by the president, given the importance of his final deliberations "for adequately formulating the objections that should be considered by Congress" (678). The Court flatly rejected the contention that the ten day period for presidential consideration of bills count as ten legislative days (that is, days when Congress is in session), favoring the interpretation of the words "in their natural and obvious sense" (679) as meaning ten calendar days (except Sundays).

The Court then grappled with the key question of the meaning of "adjournment," noting that "the determinative question in reference to an 'adjournment' is not whether it is a final adjournment of Congress or an

interim adjournment. . .but whether it is one that 'prevents' the President from returning the bill to the House in which it originated within the time allowed" (680). They rejected the idea that a bill could be returned even to a duly authorized agent of Congress when it was not literally convened and in session, but noted also that Congress had never formally designated any officer or agent to receive returned bills during adjournment. Their objection to this return of a bill was founded not only on the fact that Congress had never given such an authorization to an agent, but also that such a return might leave a bill "in a state of suspended animation," "for days, weeks, or perhaps months" (684). Timely return of a bills was of great importance, as was prompt congressional reconsideration. Finally, the Court also noted that, up to this time, available data revealed 119 past instances of pocket vetoes occurring between sessions of Congress, out of over 400 past pocket vetoes (the rest occurred at the end of Congresses).[3] To underscore what is perhaps the pivotal point, the decision noted that the key question was the ability of the president to return the bill, not the definition of adjournment (although a more precise definition might help resolve ambiguity). While it rejected the idea of an agent acting on behalf of Congress, the Court also seemed to outline a strategy whereby this problem might be overcome. These threads are picked up in a 1938 case.

Three years later, the Court extended its ruling in the La Abra case by ruling that the president could sign a bill into law not only when Congress had recessed to reconvene at a set date, but also after Congress had adjourned sine die, after the final adjournment of the 71st Congress (Edwards v. U.S. (1932)(286 U.S. 482)). Once again, the Court emphasized two vital interests--that Congress have the opportunity for prompt

reconsideration of bills, and that the president have the opportunity to properly consider all bills before him. The Court also noted that the veto power is a legislative power.

The next case raising veto issues was Wright v. U.S. (1938)(302 U.S. 583), and it involved a regular veto of a bill that was returned to the Secretary of the Senate during a three-day Senate recess. Writing for the Court, Chief Justice Hughes noted that the recess in question was not "an adjournment" (the House was still in session). More pertinent to the Pocket Veto case, the Court contradicted its previous assertion by saying now that the "Constitution does not define what shall constitute a return of a bill or deny the use of appropriate agencies in effecting the return" (589). The Court now saw no problem with the use of duly designated messengers for each branch of government, rejecting any "artificial formality" (590). It also dismissed the delay problem attributed to the use of agents mentioned in the Pocket Veto case as being, in this instance, "illusory" (595). The Court decision cited at some length the amicus curiae brief of the losing side of the Pocket Veto case to buttress this point. In a concurring opinion, Justice Stone (joined by Justice Brandeis) emphasized even more strongly that Congress could legally designate agents to receive returned bills. Stone went on to discuss the Pocket Veto case, concluding that "it should now be frankly overruled" (604). He concluded by emphasizing adjournment "as that which prevents return" (608). Thus, any action facilitating the return of vetoed bills, including the designation of agents when Congress is not in session, is in keeping with the meaning and spirit of the Constitution.

Recent court challenges. Two recent court cases have brought new life to the issues raised by the Pocket Veto and Wright cases. The first involved a challenge by Senator Edward Kennedy to a pocket veto exercised by President Nixon during a six-day Christmas recess in 1970 (the ten-day period for the bill, the Family Practice of Medicine Act, expired during the break). The bill had passed overwhelmingly in both chambers, and Nixon was immediately criticized for using the pocket veto inappropriately as a way to avoid an override vote. In a speech on the floor of the Senate, Kennedy argued that a pocket veto was not warranted because there had been no adjournment, and because Nixon had not been prevented from returning the bill (Condo, 1973: 395-96). Moreover, the pocket veto had been infrequently applied between congressional sessions (especially in recent years) and during recesses. Up until 1970, pocket vetoes during Christmas recesses had been applied only three times, all in the nineteenth century. Of the 187 pocket vetoes during the Truman, Eisenhower and Kennedy administrations, 13 were applied during recesses. Also, the practice of calling an adjournment during a session of Congress rarely occurred before 1943. The absence of court challenges to other pocket vetoes in recent years is probably attributable to the fact that the bills involved were minor and/or uncontroversial ("The Veto Power and Kennedy v. Sampson," 1974: 602).

On August 9, 1972, Kennedy filed suit to compel publication of S.3418 as a law (Kennedy v. Sampson, 364 F.Supp. 1075 (D.D.C.1973)).[4] A federal district court ruled that Nixon had not been prevented from returning the vetoed bill to Congress, especially given that the veto occurred in the middle of a congressional session. On appeal, the federal Court of Appeals

expanded this ruling, raising doubts about pocket vetoes applied during any intrasession adjournment, as long as arrangements were made for receipt of possible veto messages (Kennedy v. Sampson, 511 F 2d 430 (D.C. Cir. 1974)). In refuting the Pocket Veto case, the Appeals Court also noted that congressional practices had changed dramatically since the 1920s. Lengthy adjournments were the norm up until that time. In fact, until 1818, Congress terminated all business not completed by the end of its first session. After 1818, the House allowed six days of the next session for completion of previous business. The Senate implemented this change in 1848. Shortly after that time, both houses dropped the six-day rule (Rogers, 1920: 21).

By the 1970s, Congress was typically in session for nearly the entire year. Moreover, the state of communications is such that the logistical problems of past eras no longer exist ("The Veto Power and Kennedy v. Sampson," 1974: 607-11).

In a move that engendered significant public criticism, the Solicitor General for the Nixon Administration, Robert Bork, declined to appeal the case to the Supreme Court (Keeffe and Jorgenson, 1975: 755). The Kennedy case was significant because it was the first instance of a pocket veto being held unconstitutional, and also because it pointed the way to the principle that the pocket veto could only be applied after sine die adjournments at the end of a Congress.[5]

During the 1970s, both the Ford and Carter presidencies abided by the principle of avoiding pocket vetoes during intra- and intersession adjournments, and Congress formalized procedures for receiving presidential messages during adjournments (Fisher, 1985: 152-53). This pattern changed

during the Reagan Administration. In December, 1981, Reagan pocket vetoed a relief bill for a Florida company between the first and second sessions of the 97th Congress. The affected company contested the veto in court, but nothing came of the action.

A significant court challenge emerged from Reagan's pocket veto of a bill (HR 4042) designed to reinstate the requirement that the president certify to Congress every six months that El Salvador was making progress on human rights in order for it to continue receiving American aid. The pocket veto occurred at the end of the first session of the 98th Congress in November, 1983. The veto prompted an immediate challenge by Congressman Michael D. Barnes and 32 other Democratic members of the House (the leaders of both parties in both houses later joined Barnes in the suit). On March 9, 1984, a federal District Court judge ruled in favor of the veto, citing the Pocket Veto case as the key precedent (rejecting the precedents in Wright and Kennedy) and saying that the pocket veto could be used between sessions of Congress (Barnes v. Carmen, 582 F. Supp. 163 (1984)).

This ruling was overturned on appeal by a Court of Appeals three-judge panel (Barnes v. Kline, 759 F.2d 21 (1985)). In a two-to-one decision, the majority ruled that the president may use the pocket veto only at the end of a two-year term of Congress. The pocket veto, said the Court, "necessarily applies to the final adjournment by a Congress. . . ." It was persuaded that, as long as Congress made arrangements to receive veto messages during adjournments and recesses, the practical problems of delay and uncertainty surrounding bill return cited in the Pocket Veto case could be easily remedied. Should the Congress decline to continue designating agents for receipt of messages (and it would certainly not be in Congress's interest to

do so), the Court said that the old Pocket Veto rule would again apply. In a 63-page dissent, Judge Robert Bork (who, ironically, had defended this expansive use of the pocket veto while serving as Nixon's Solicitor General) argued that the courts should stay out of disputes between the other branches of government, unless it was necessary to resolve suits resulting from the suffering of tangible injuries. Bork declared that neither individual congressmen nor Congress as a whole could challenge the president's use of the pocket veto power.

The decision was appealed to the Supreme Court (Burke v. Barnes, 93 L Ed 2d 732). On January 14, 1987, the Court ruled by a six-to-two vote (Justice Scalia took no part) that the case arising from the pocket veto of HR 4042 was moot, since there was no longer "a live case or controversy" (733). Writing for the majority (Justices Brennan, Marshall, Blackmun, Powell and O'Connor), Chief Justice Rehnquist[6] concluded that "any issues concerning whether HR 4042 became a law were mooted when that bill expired by its own terms" (736). The date of expiration referred to was September 30, 1984. In the dissenting opinion Justice Stevens, joined by Justice White, argued strongly that the case was by no means moot. For the majority to assert that the issue was moot because the law had expired begs the very question of whether, in fact, the bill was a law in the first place, according to the dissenters. Congress had a valid interest in knowing whether HR 4042 was or was not a valid law both before and after the termination date of the legislation. If the bill was a valid law, Congress would have a clear interest in recovering funds allocated unlawfully to El Salvador, as well as in seeking compliance with other sections of the law.

In declaring the case moot, the majority vacated the judgment of the Court of Appeals, directing that court to remand the case to the District Court with instructions to dismiss the complaint.

Conclusion

The pocket veto represents an anomaly, as it is a kind of power--an absolute veto--the founders flatly rejected. Its presence in the Constitution is explainable only within the context of presidential defense against abrupt, untimely congressional adjournment aimed at thwarting the president's ability to exercise the regular veto power. As long as arrangements for exercise of the regular veto are in place, no reason for resorting to the pocket veto exists aside from sine die adjournments. This conclusion is buttressed by these considerations:

--the Constitution's bias in favor of the regular veto (the use of which is unrestrained in the Constitution) over the pocket veto (the use of which is clearly circumscribed).

--the importance of the two-way flow of legislation--a flow the pocket veto interrupts. The collective judgment of the last 200 years is unanimous in concluding that the president must have sufficient time to consider bills, and also that Congress should have time to consider and overrule vetoes. It is important to remember also that the veto power was viewed by the Constitution's founders to be a positive, constructive, revisionary device that would allow the president to bring vetoed bills back to Congress for a final round of constructive adjustment (which was why the Constitution stipulated that the president provide written veto messages). This positive construct to

the veto power has been mostly lost in 200 years of history (Spitzer, 1988: 19-20, 124-25).[7]

--the potency of the regular veto. From 1789 to 1987, only 7.2 percent of all regular, non-pocket vetoes have been overridden. The president does not need the pocket veto to make a veto stick, nor can Congress avoid a veto from a president determined to apply it. When this power is added to the president's other numerous, efficacious means of influencing and shaping virtually every aspect of the legislative process, it is clear that presidents retain ample influence in legislative matters.

--the institutionalization of Congress. The Congress of the eighteenth century is much different than that of this century, in that it now meets year-round, has stable leadership and membership patterns, and possesses other characteristics of a mature institution. These facts alone (not to mention improved methods of communication and transportation) obviate the need for an expansive use of the pocket veto. As Senator Sam Ervin noted, "The Founding Fathers did not envision brief holiday trips to the ski slopes of Colorado or the sunny shores of the Bahamas" (Subcommittee on Separation of Powers, 1971: 3).

--the common and accepted use of aides, assistants, and other duly authorized agents by the executive and legislative branches. Even if the notion arising from the Pocket Veto case that agents of Congress could not receive bills when the body was not in session (flatly overruled in Wright), it would pose a glaring contradiction, as the presidency relies on "agents" to receive legislation from Congress, and

to perform other functions. The use of agents by Congress was proved reasonable and efficient in particular during the Ford and Carter administrations. Presidents Nixon's and Reagan's more expansive application of the pocket veto is illustrative simply of a desire (not a need) to use an absolute veto instead of a return veto, and bears no relation to the purposes or necessities of the pocket veto power.

--Even the Pocket Veto case, cited as the principal support for freer use of the pocket veto, provides fuel for the conclusion that the pocket veto should be applied only at the end of a two-year Congress (see Dumbrell and Lees, 1980). It emphasized the importance of granting the president adequate time to consider legislation; it pointed out (as did other cases) that the definition of adjournment per se was not important; that instead, the question of whether the president was prevented from returning a bill was important; and that bills could not be left in limbo, because Congress, too, had a right and an obligation to deal with presidential objections in a timely, expeditious manner. Under modern circumstances, these concerns are allayed.

To argue that the pocket veto power should be applicable only at the end of a Congress is not to suggest the possibility of pushing the power out of existence altogether. Clearly, ". . .the framers did not intend a presidential veto of legislation passed by one Congress to be considered, and possibly overridden, by another" ("The Veto Power and Kennedy v. Sampson," 1974: 594). Each two-year Congress is a distinct entity, even if the personnel remain largely the same from one to the next.

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The existence of the pocket veto is explainable only in the context of the circumstances that gave it rise and circumscribe its application. Given the changes in circumstances related to the pocket veto (longer sessions, legally designated agents, etc.), legislative clarification of the sort proposed by H.R. 849 can only be considered a reasonable adaptation that conserves the balance the framers sought.

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FOOTNOTES

1. See "The Veto Power and Kennedy v. Sampson" (1974: 592). "Because in the Constitution `[e]very word appears to have been weighted with the utmost deliberation,'. . .it cannot be said that the pocket veto, as an absolute negative, was unintended by the framers." (n.19)

2. The docket title of the case is The Okanogan, Methow, San Poelis, Nespelen, Colville, and Lake Indian Tribes or Bands of the State of Washington v. U.S.; or, Okanogan v. U.S.

3. By a more recent count, 25 of the 30 presidents (up to and including Nixon) who have used the pocket veto have exercised it during intercession adjournments in 272 instances (Barnes v. Kline, 759 F.2d 21 (1985): 39). In citing these data as seeming to support such use of the pocket veto, the Appeals Court also noted that this past practice did not resolve the question of the use of pocket veto power by modern presidents, since intersession adjournments were formerly five to six months in duration on average, whereas they now average four weeks or less.

4. For more on the Kennedy challenge and a good background on the pocket veto controversy, see Subcommittee on the Separation of Powers (1971).

5. Kennedy also challenged Nixon's pocket veto of an urban mass transit bill, rendered between the first and second sessions of the 93rd Congress on December 22, 1973 (Kennedy v. Jones, 412 F. Supp. 353 (D.D.C. 1976)). But on April 13, 1976, the Ford Administration consented to the entry of judgment in favor of Kennedy. According to at least one constitutional law expert (Cooley, 1931: 148, n.36), ". . .it seems quite clear that the word `adjournment'. . .means the final adjournment of the Congress itself and not the adjournment of one of its sessions."

6. While serving as Assistant Attorney General under President Nixon, Rehnquist defended Nixon's expansive interpretation of the pocket veto power. See Subcommittee on Separation of Powers (1971: 5-10, 194-96).

7. As late as seven days before the end of the federal convention, the draft wording of the veto clause said: "Every bill. . .shall, before it become a law, be presented to the President of the United States, for his revision; if upon such revision, he approve of it he shall signify his approbation by signing it: But if upon such revision it shall appear to him improper, for being passed into a law, he shall return it, together with his objections against it, to that House in which it shall have originated. . . ." (Farrand, 1966, II: 568-69; emphasis added)

APPENDIX

72 The Presidential Veto

Table 3–1
Summary of Bills Vetoed, 1789–1987 *

President	*Total vetoes*	*Regular vetoes*	*Pocket vetoes*	*Vetoes per year* ▸	*Vetoes overridden*
George Washington	2	2	—	.2	—
John Adams	0	—	—	—	—
Thomas Jefferson	0	—	—	—	—
James Madison	7	5	2	.9	—
James Monroe	1	1	—	.1	—
John Q. Adams	0	—	—	—	—
Andrew Jackson	12	5	7	1.5	—
Martin Van Buren	1	—	1	.2	—
W. H. Harrison	0	—	—	—	—
John Tyler	10	6	4	2.5	1
James K. Polk	3	2	1	.7	—
Zachary Taylor	0	—	—	—	—
Millard Fillmore	0	—	—	—	—
Franklin Pierce	9	9	—	2.2	5
James Buchanan	7	4	3	1.7	—
Abraham Lincoln	7	2	5	1.7	—
Andrew Johnson	29	21	8	7.2	15
Ulysses S. Grant	93	45	48	11.6	4
Rutherford B. Hayes	13	12	1	3.2	1
James A. Garfield	0	—	—	—	—
Chester A. Arthur	12	4	8	3.0	1
Grover Cleveland	414	304	110	103.5	2
Benjamin Harrison	44	19	25	11.0	1
Grover Cleveland	170	42	128	42.5	5
William McKinley	42	6	36	10.5	—
Theodore Roosevelt	82	42	40	10.2	1
William H. Taft	39	30	9	9.7	1
Woodrow Wilson	44	33	11	5.5	6
Warren G. Harding	6	5	1	3.0	—
Calvin Coolidge	50	20	30	8.3	4
Herbert Hoover	37	21	16	9.2	3
Franklin D. Roosevelt	635	372	263	52.9	9
Harry S. Truman	250	180	70	31.2	12
Dwight D. Eisenhower	181	73	108	22.6	2
John F. Kennedy	21	12	9	10.5	—
Lyndon B. Johnson	30	16	14	5.0	—
Richard M. Nixon	43	26	17	7.8	7
Gerald R. Ford	66	48	18	26.4	12
Jimmy Carter	31	13	18	7.7	2
Ronald Reagan (1981–1987)	62	33	29	8.9	8
Total	2453	1413	1040		102

* Data drawn from *Presidential Vetoes, 1789–1976, 1977–1984,* and update from U.S. Senate Library.

▸ Rounded to the nearest tenth. For those presidents who did not serve full years, their years in office were rounded to match the nearest complete Congress, since vetoes can only be exercised when Congress is in session.

Chairman DERRICK. Dr. Fisher.

STATEMENT OF LOUIS FISHER, SENIOR SPECIALIST IN AMERICAN NATIONAL GOVERNMENT WITH THE GOVERNMENT DIVISION, CONGRESSIONAL RESEARCH SERVICE, LIBRARY OF CONGRESS

Mr. FISHER. Thank you for inviting me here this morning.

As you know, this issue has been ricocheting around the branches for 60 years, sometimes in the courts, sometimes in Congress, sometimes between the branches for political accommodations, back to the courts, and now back to you.

I would like to compliment you for introducing the bill to clarify the matter and protect the prerogatives of the President and of Congress.

There is a tendency on constitutional issues to assume that they all percolate up to the U.S. Supreme Court for resolution, but constitutional change comes from all three branches, particularly in separation of powers. It is very important for the legislative branch and executive branch to take the initiative and put forth their own interpretations, which you are doing in your bill.

I notice that the Justice Department is taking the position that you cannot clarify the constitutional question by legislation. At the end of my statement I want to comment on that.

On the pocket veto, it is very easy to get into some technical, esoteric nuances. It is not necessary to do that. What you have done in your bill, Mr. Chairman, is to look at fundamentals and to see that the fundamentals you present are consistent with prior practice and court cases.

A fundamental I am talking about, and the courts have addressed this many times, is to protect the President's right to consider legislation submitted to him, to make a decision whether he wants to sign it or veto it. But second and just as important, the right of Congress to examine a veto message and decide whether they want to sustain it or override it. The courts have been very consistent that both of those purposes of the veto process have to be protected.

I think your bill also, in addition to protecting those fundamental interests, narrows in an appropriate way the absolute veto. The Framers addressed the question of whether the President should have an absolute veto. They rejected it unanimously.

What you have done is to restrict the pocket veto, and in an appropriate way, to the end of a Congress.

Third, your bill recognizes some fundamental changes in the congressional process from the 19th century to this century. In previous years it was common for Congress at the end of a first session to leave for 5 months or 6 months, whereas today the recesses and adjournments within a session and between sessions are relatively brief. And if you look at the *Barnes* case, the D.C. Circuit noted that the intersession adjournments "do not differ in any practical respect" from the intrasession adjournments that were given in the *Wright* case of 1938 and in the *Kennedy* cases of the 1970's.

In the *Barnes* case, the D.C. Circuit said, "The line dividing in the first and second sessions has ceased to have any practical significance."

In addition to supporting the language you have in the bill, I suggest in my statement two other possible additions to your bill. You might want to provide expressly for an authorized receiver in each House to receive bills while you are adjourned so the President is not prevented from returning a veto message to you. Then, second, perhaps add bill language to provide for the carryover of business from the first session to the second session.

I make those two recommendations because the D.C. Circuit in 1985, suggested that there is a cluster of factors that led them to conclude that the pocket veto should be restricted, and those were the three.

Finally, on the Justice Department position, they say in their statement on pages 2 and 3 that, whether an adjournment prevents a return "must be decided by interpreting the Constitution, the meaning of which can be changed only by constitutional amendment, not by legislation."

I think that position contradicts everything we know about the process of constitutional change and about the role of Congress and the executive branch, contradicts what the courts said about the process and contradicts even opinions by the Attorney General, and I will mention that in a second.

On the process of constitutional change from 1789 on, Congress has been a very important shaper of what the Constitution means. One example I take from 1789, because the Justice Department likes it, is the question of whether the President can remove heads of departments. The Constitution is silent on that.

As you know, in the First Congress in 1789, the House spent a great deal of time deciding whether the President has that power. Obviously, there was no guidance from the courts. Congress had to, on its own, determine the meaning of the Constitution, and it decided, consistent with their own principles, that the President needed that authority at least for cabinet heads.

On other separation of powers questions, they are determined largely by decisions from Congress and the executive branch, not from the courts. If you want to be very specific even on the veto power, what does it mean in the Constitution when it says you need a two-thirds majority to override? It is not defined in the Constitution. We didn't need a constitutional amendment to clarify that. Congress had decided on the question of whether you needed two thirds of the whole membership, two-thirds of those present, or just two-thirds of those present and voting. It concluded that two-thirds of those present and voting will suffice. That construction by Congress was later upheld by the Supreme Court in 1919 in the *Missouri Pacific* case.

Just to give an example on the Executive side, may a President sign a bill after Congress adjourns? The Constitution doesn't say anything about that. We didn't need an amendment to the Constitution to clarify that issue.

The Attorney General in 1920, and again in 1930, I believe, said that the President may, after Congress goes home, sign a bill. So the executive branch by its own construction shaped the meaning

of the Constitution and that was upheld by the Supreme Court later in the *Edwards* case in 1932. So all branches have a right and a responsibility to determine the meaning of the Constitution.

The last two points I will make refer to the expectation of the Supreme Court. The Supreme Court expects the Congress and the executive branch to put forth their own interpretations of the Supreme Court and those interpretations are generally given great weight and they are often decisive.

Second, the Supreme Court expects particularly Congress to interpret its powers because if Congress fails to and acquiesces in constructions by the executive branch, then the Supreme Court considers that a passive Congress has surrendered its powers to the executive branch. It will often refuse to hear cases until Congress takes a position.

I think your bill is consistent on all those principles.

Chairman DERRICK. Thank you very much, Dr. Fisher.

[Mr. Fisher's prepared statement and other material follow:]

**TESTIMONY OF LOUIS FISHER,
CONGRESSIONAL RESEARCH SERVICE,
HEARINGS ON THE POCKET VETO,
HOUSE COMMITTEE ON RULES, JULY 26, 1989**

Mr. Chairman, thank you for inviting me to testify on H.R. 849, a bill to clarify the status of the President's pocket veto. This legislation is an excellent example of how constitutional issues migrate from one branch to another in search of an answer. The dispute was partly resolved by the lower courts, in 1973 and 1974, and resolved in full by an executive-legislative accommodation during the Ford and the Carter administrations. That political accommodation collapsed during the Reagan administration, throwing the matter back to the courts. It appeared that the dispute might be resolved once and for all by the judiciary, but the Supreme Court, in 1987, concluded that the issue was moot and the pocket veto issue was returned to the political process. H.R. 849 is a reasonable response to this lingering problem.

The Constitution provides that any bill not returned by the President within ten days (Sundays excluded) shall become law "unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law." When Congress "prevents" the return of a bill, the President may exercise the "pocket veto." The pocket veto was first used by President Madison in 1812 and has since been used more than a thousand times.

The effect of H.R. 849 would be to limit the pocket veto to the adjournment sine die that ends a Congress. Pocket vetoes could not be exercised within the first or second sessions or between the sessions. Thus, H.R. 849 would codify the political

accommodation that existed during the Ford and Carter administrations. Moreover, H.R. 849 is consistent with the principles established by the lower courts in 1973, 1974, and 1984.

From 1929 to the present time, litigation has failed to define how many days Congress must be absent to "prevent" the President from returning a veto. A unanimous Court in the *Pocket Veto Case* of 1929 agreed that a congressional adjournment in the first session of five months (from July 3 to December 6, 1926) prevented the President from returning the bill. 279 U.S. 644. The Court noted: "No light is thrown on the meaning of the constitutional provision [for the pocket veto] in the proceedings and debates of the Constitutional Convention; and there has been no decision of this Court dealing directly with its meaning and effect in respect to the precise question here involved." Id. at 675-676. It was suggested to the Court that Congress could authorize an officer or agent or either House to accept veto messages returned by the President during a congressional adjournment, but the Court observed that Congress had not enacted legislation or adopted a rule to that effect, and "even if authorized by Congress itself, [this procedure] would not comply with the constitutional mandate." Id. at 684. The Court referred to an effort by Congress in 1868 to provide that the President could return a bill to the office of the Secretary of the Senate or the Clerk of the House of Representatives during an adjournment of Congress. The bill passed the Senate but was never reported by the House Judiciary Committee. Id. at 686-687.

The next case before the Court ran in the opposite direction: from the five months at issue above to a short Senate recess of three days in *Wright* v. *United*

States (1938). First, the Court pointed out that Congress had not adjourned. Only the Senate had recessed; the House remained in session. "Plainly, the taking of such a recess is not an adjournment by the Congress" that prevents the return of a bill. 302 U.S. 583, 589. Second, the Secretary of the Senate "was functioning and was able to receive, and did receive, the bill." Id. at 590. Third, the Senate's recess was so brief that the Senate could act with "reasonable promptitude" on the veto. Id. Contrary to the language in the *Pocket Veto Case* of 1929, the Court in *Wright* had no objection to congressional officials receiving bills. "The bill is sent by a messenger and is received by the President. It is returned by a messenger, and why may it not be received by the accredited agent of the legislative body?" Id.

Wright v. *United States* established the important balance that must be maintained: (l) giving the President an opportunity to consider a bill presented to him and (2) giving Congress an opportunity to consider his objections and override them. Both objectives require protection. To allow the pocket veto to expand without limit would create a kind of absolute veto the framers emphatically rejected. Id. at 596-597.

The *Kennedy* Cases

There the matter sat until 1970, when President Nixon pocket vetoed a bill during the Christmas holidays after the Senate was absent for four days and the House for five (not counting December 27, a Sunday). Unlike the 1929 case, Nixon's action involved a short adjournment *during* a session rather than a lengthy

adjournment at the end of a session. This distinction became of pivotal importance to the judiciary. In 1973, a district court cited that distinction as a principal reason for holding that the Christmas adjournment had not prevented Nixon from returning the bill to Congress as a regular veto. Moreover, in both *Wright* and the 1973 case, the Senate had specifically authorized its Secretary to receive messages from the President during a recess. Kennedy v. Sampson, 364 F.Supp. 1075, 1084 (D.D.C. 1973) ("*Kennedy I*"). Similar to *Wright*, *Kennedy I* extended protection to both constitutional purposes: the President's opportunity to consider bills presented to him, and Congress's opportunity to consider veto messages and override the President. Id. at 1086.

The manner in which the D.C. Circuit affirmed this decision the next year cast doubt on the use of pocket vetoes during *any* intrasession adjournment. The court concluded that an intrasession adjournment "does not prevent the President from returning a bill which he disapproves so long as appropriate arrangements are made for the receipt of presidential messages during the adjournment." Kennedy v. Sampson, 511 F.2d 430, 437 (D.C. Cir. 1974) ("*Kennedy II*"). *Kennedy II* emphasized that the rejection of an absolute presidential veto (which is what a pocket veto amounts to) "is explicit both in the proceedings of the Constitutional Convention and in contemporary commentary." Id. (footnote omitted). Like *Wright* and *Kennedy I*, *Kennedy II* felt obliged to preserve the prerogatives of both branches: the President's right to consider bills and Congress's right to override the President. Id. at 438.

Kennedy II also explained the difference between the Congress of the *Pocket Veto Case* of 1929 (an adjournment for five months) and the much briefer periods for

recesses and adjournments of the contemporary Congress. "The modern practice of Congress with respect to intrasession adjournments creates neither of the hazards -- long delay and public uncertainty -- perceived in the *Pocket Veto Case*." Id. at 440. Instead of lengthy recesses and adjournments, the current practice of Congress is to take "several recesses of approximately five days for various holidays and a summer recess (or recesses) lasting about one month." Id. at 441.

The logic of *Kennedy II* implies that brief periods of congressional adjournment -- whether *intra*session or *inter*session -- do not "prevent" the President from returning a bill for a possible override. This would rule out pocket vetoes within either the first or the second session and also between the two sessions. Such reasoning would limit the pocket veto to one occasion: final adjournment at the end of the second session. In fact, this was the political accommodation announced during the Ford and Carter administrations.

A Political Accommodation

What was left uncertain as a legal issue from *Kennedy II* was resolved by a political accommodation during the Ford administration. *Kennedy II* clearly ruled out the pocket veto within a session. The Ford administration, communicating its views through House Minority Leader John Rhodes, announced that it would not use the pocket veto *between* sessions. Congressman Rhodes stated in 1975 that President Ford "will either sign it or veto it in the ordinary way, which would preserve the right of this House and of the other body to either sustain or override those vetoes when we

come back after the sine die adjournment [at the end of the first session]." 121 Cong. Rec. 41884 (1975). Even more explicit was the announcement from the Justice Department on April 13, 1976. It stated that President Ford would use the return veto "rather than the pocket veto during intra-session and inter-sessions recesses and adjournments of the Congress, provided that the House of Congress to which the bill and the President's objections must be returned according to the Constitution has specifically authorized an officer or other agent to receive return vetoes during such periods." 122 Cong. Rec. 11202 (1976).

The accommodation announced by the Ford administration was also honored by President Carter. The pocket veto was exercised only at the end of a Congress. On January 21, 1981, at the start of the 97th Congress, the House of Representatives changed its rules to reflect *Kennedy II* by authorizing its Clerk "to receive messages from the President and from the Senate at any time that the House is not in session." House Rule III, Clause 5; H. Doc. No. 398, 96th Cong., 2d Sess. 310-311 (1981).

Nevertheless, after Congress had adjourned at the end of the first session of the 97th Congress (to return in about five and a half weeks), President Reagan pocket vetoed a special relief bill for a bankrupt Florida firm. Public Papers of the Presidents, 1981, at 1208. President Reagan abided by *Kennedy II* to the extent that he did not exercise the pocket veto during intrasessions. Public Papers of the Presidents, 1984 (II), at 1205. At the end of the first session of the 98th Congress, Reagan again exercised his pocket veto power. On November 30, 1983, he pocket vetoed a bill to require certification of human rights practices in El Salvador as a precondition for sending military aid. The House had adjourned sine die on November

18 and did not return until January 23, 1984 -- nine weeks later. A bipartisan group of thirty-three members of the House of Representatives filed suit to require that the bill be published as a public law.

Back to the Courts

In 1984, a district judge upheld President Reagan's action. The judge reasoned that the case most pertinent was the Pocket Veto Case of 1929, which also involved a multi-month sine die adjournment between the first and second sessions. Although the 1929 decision had been shaken by *Wright* and the *Kennedy* cases, the judge felt obliged to follow the single holding of the Court that seemed to him most relevant. Barnes v. Carmen, 582 F.Supp. 163 (D.D.C. 1984).

This decision was reversed by the D.C. Circuit on August 29, 1984 (amended and issued in 1985). The appellate court held that adjournment of the 98th Congress at the end of the first session did not prevent return of a bill presented to the President. Essential to the court was the action of Congress in authorizing legislative officials to receive veto messages during the adjournment:

> "Given that both the House of Representatives and the Senate had expressly arranged before adjourning for an agent specifically authorized to receive veto messages from the President during the adjournment, it is difficult to understand how Congress could be said to have prevented return of H.R. 4042 simply by adjourning. Rather,

by appointing agents for receipt of veto messages, Congress affirmatively *facilitated* return of the bill in the eventuality that the President would disapprove it." Barnes v. Kline, 759 F.2d 21, 30 (D.C. Cir. 1985) (emphasis in original).

The court later remarked that no more uncertainty surrounds the congressional procedure of designating an agent to receive veto messages than "the corresponding procedure by which the Executive Clerk receives bills for the President and returns them to Congress." Id. at 37 n. 31. That procedure, followed by the White House, was upheld in Eber Bros. Wine & Liquor Corp. v. United States, 337 F.2d 624 (Ct. Cl. 1964), cert. denied, 380 U.S. 950 (1965).

Two other elements weighed heavily in the decision by the D.C. Circuit. First, the framers decisively rejected an absolute veto for the President. The court referred to James Madison's statement at the convention: "To give such a prerogative would certainly be obnoxious to the temper of this country." Id. at 31. Second, the court accepted the reasoning in *Wright* that the judiciary should not interpret the Constitution in a manner that would frustrate either the President's opportunity to consider bills or the Congress's opportunity to override the President. If a court failed to demonstrate that the President "was truly deprived" of the opportunity to exercise a qualified veto, it would end up "sacrificing, without justification, Congress's right to reconsider disapproved legislation." Id. at 34. Although the D.C. Circuit appreciated the district court's desire to read the *Pocket Veto Case* strictly, the D.C. Circuit

concluded that this strict interpretation failed to serve "the essential purposes of the veto provisions." Id. at 35.

The D.C. Circuit further noted that in the modern era intersession adjournments "do not differ in any practical respect from the intrasession adjournments at issue in *Wright* and *Kennedy* v. *Sampson*." Id. at 36. "For the line that divides the first session of a Congress from the second has ceased to have any practical significance." Id. at 38. Furthermore, the rules of each House of Congress guarantee the opportunity to immediately reconsider all business unfinished at the end of the first session. Id. Finally, the adjournment resolution at the end of the first session provides that Congress can be reassembled at any time, permitting even more prompt action if necessary. Id.

It appeared that the pocket veto issue might be resolved once and for all by the Supreme Court, but in 1987 the Court held that the issue had been mooted because the bill in question had expired. There was no longer a live case or controversy. Burke v. Barnes, 479 U.S. 361 (1987).

The Issue Returns to Congress

Mr. Chairman, I think H.R. 849 will resolve some of the issues that have eluded a definitive answer in the courts. H.R. 849 provides that only the adjournment sine die at the end of a Congress "prevents the return of a bill by the President." The bill also amends Clause 5 of Rule III of the House Rules, requiring the Clerk to notify

the Speaker in writing whenever a bill has been presented to the President and ten days (Sundays excepted) have elapsed.

I suggest that the bill be amended to take into consideration some of the factors that influenced the D.C. Circuit's decision in *Barnes* v. *Kline*. The court stated: "we do not hold that intersession adjournments can never prevent return." Id. at 41. Several factors, "taken together," determined this ruling, including the existence of an authorized receiver of veto messages and the congressional rules providing for carryover of unfinished business. Id. A bill introduced by Senator Ervin in 1971 (S. 1642) provides language that you may want to use as guidance. For example, § 303 of S. 1642 provided:

> "Return to an officer designated and authorized by the House of Representatives or the Senate respectively, to receive bills so returned prior to adjournment while the body is not actually in session shall constitute a return to that House. Such officer shall call the manner to the attention of that House, through its presiding officer, on the next succeeding day on which it is in session."

Identical language appeared in H.R. 6225, introduced by Congressman Celler on March 17, 1971. However, it was omitted from H.R. 7386, which was reported by the House Judiciary Committee on May 1, 1974. H. Rept. No. 93-1021, 93d Cong., 2d Sess. (1974). H.R. 7386 provided that the return of a bill is prevented "only when the adjournment of the Congress, or of either House, is sine die." The purpose of the bill

was to make clear that the President is not prevented from returning bills "at any time during a session of Congress," H. Rept. No. 93-1021, at 3.

In addition to language that would authorize legislative officers to receive veto messages, you may also want to include language to provide for carryover of unfinished business. This measure provides an opportunity for Congress to clarify a constitutional issue that has remained unsettled, and unsettling, for sixty years.

SPECIAL REPORT: THE U.S. SUPREME COURT

Jurists aren't the only government officials who interpret the Constitution—nor are their pronouncements final. When the country is displeased with the Court's rulings, the gavel passes to Congress and the president.

Looking for the Last Word

BY LOUIS FISHER

In 1986, when Justice William Rehnquist appeared before the Senate Judiciary Committee as nominee for chief justice of the Supreme Court, Sen. Arlen Specter (R-Pa.) asked him whether the Court "is the final arbiter, the final decision-maker of what the Constitution means." Rehnquist replied disarmingly, "Unquestionably."

A year later, during the nomination hearings for Anthony Kennedy, Specter and his Judiciary Committee colleagues heard a contrary view. Kennedy told the Senate panel that, in such areas as separation of powers, the office of the presidency, the commerce clause, and federalism, the meaning of the Constitution depends almost exclusively on the judgments of the executive and legislative branches.

The nominee did not leave the implications of this theory to the imagination of his interlocutors. He told Specter that if the Court were to overrule *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), concluding that newspapers no longer have protection under the libel laws, Specter would be free to say that the decision was "constitutionally wrong" and seek legislation to overturn the Court. Not only did Kennedy advise Specter that he could do that, he *should*, given his constitutional responsibilities as senator.

Kennedy was advocating what is known as "coordinate construction": the freedom of each branch to interpret the Constitution independently. Taken to its extreme, the doctrine could produce legal chaos. But we have a history in which the three branches insist on independent construction, and we are none the worse for it. The results of the 1988-89 term show that the tradition is very much alive.

An early example of this practice was *McCulloch v. Maryland*, 4 Wheat. 316 (1819), where the Court upheld the constitutionality of the Bank of the United States—and President Andrew Jackson dissented. Jackson based his veto of bank legislation on his own independent interpretation, and that construction of the presidential veto power has prevailed ever since.

Abraham Lincoln, in his famous speech at Springfield in 1858, accepted the 1857 *Dred Scott* decision, 19 How. 393, only with respect to the individual litigants before the Court. He refused to endorse the decision as a "political rule" for the nation, especially the question of spreading slavery to the territories. To Lincoln, the Supreme Court was a co-equal, not a superior, branch of government. As he said in his inaugural address in 1861, if government policy on "vital questions affecting the whole people is to be irrevocably fixed" by the Court, "the people will have ceased to be their own rulers."

In the early part of this century, Congress asserted its powers as a constitutional interpreter. When the Supreme Court in 1918 and 1922 held that Congress could not rely on the commerce clause or the taxing power to regulate child labor, Congress (and the country) rejected the Court's reasoning. Congress passed a constitutional amendment in 1924 to give it the power to regulate child labor. By 1937, only 28 of the necessary 36 states had ratified the amendment—yet the following year, relying again on the commerce power, Congress included a child-labor provision in the Fair Labor Standards Act. This time, a unanimous Court acceded in *United States v. Darby*, 312 U.S. 100 (1941). Similarly, Congress repeatedly challenged the narrow Court doctrines that prevented national regulation of the economy. Again, in time, Congress prevailed.

Congress as Protector

The legislative branch has not stopped at constitutional interpretations that enhance its own power; it has upheld individual freedoms against governmental incursions as well. In *Zurcher v. Stanford Daily*, 436 U.S. 547 (1978), the Supreme Court held that government may use a search warrant on the premises of a newspaper, even though the newspaper is not suspected of criminality. The decision was promptly denounced as a first step toward a police state. In 1980, Congress responded with a statute requiring federal and state officers to use a less intrusive subpoena instead of a search warrant to obtain documentary materials from newspapers. Congress performed the same task attempted by the Court—balancing law enforcement against other interests—and reached a strikingly different result.

More recently, in *Goldman v. Weinberger*, 475 U.S. 503 (1986), the Court upheld an Air Force regulation that prohibited Captain Simcha Goldman, an Orthodox Jew and ordained rabbi, from wearing his yarmulke while on duty indoors. The Court accepted the Air Force's argument that obedience, discipline, and unity are important and overriding values. Congress did not. The following year it passed a law to permit service members to wear religious apparel indoors, while on duty, so long as it is "neat and conservative" and does not interfere with military duties.

As the *Goldman* case and others illustrate, the three branches of government are continually engaged in what might be termed "constitutional dialogues." Typically, the Court makes a series of exploratory movements followed by backing and filling—a necessary and sensible policy for resolving constitutional issues that have profound political, social, and economic ramifications. Decisions handed down by the Supreme Court during the past term reflect ongoing dialogues, particularly on the death penalty, civil rights, and abortion.

The meaning of "cruel and unusual" under the Eighth Amendment has been determined more by American culture than by Supreme Court decisions. In *Trop v. Dulles*, 356 U.S. 86 (1958), the Court interpreted the amendment in light of the "evolving standards of decency that mark the progress of a maturing society." When the number of executions fell dramatically in the 1950s and 1960s, those trends set the stage for *Furman v. Georgia*, 408 U.S. 238 (1972), which struck down death-penalty statutes in Georgia and Texas.

Legislative action in the states, however, demonstrated that the public did not support the elimination of the death penalty. The majority of states quickly reinstated the ultimate punishment, although they adopted new procedures to avoid challenges of arbitrariness. The "evolving standards of decency" still supported executions, as the Court acknowledged in *Gregg v. Georgia*, 428 U.S. 153 (1976), when it upheld the refurbished state laws.

Death-Penalty Debate

A year later, the Court looked to contemporary state practices for guidance in deciding whether a death penalty for rape was constitutional. It found the gradual abandonment of that penalty by most states persuasive, finding in *Coker v. Georgia*, 433 U.S. 584 (1977), that the death penalty is disproportionate for the crime of raping an adult woman.

This past June, a majority of the justices ruled, in *Penry v. Lynaugh*, 57 U.S.L.W. 4958 (June 26, 1989), that the Eighth Amendment does not categorically bar execution of the mentally retarded. The five justices cited a lack of "objective indicators" from society to prohibit such executions. The "clearest and most reliable objective evidence of contemporary values," said the Court, are the statutes passed by legislatures. The Court also looked to data concerning the actions of sentencing jurors.

Similarly, facing the question of the execution of juveniles, five justices affirmed the death sentences of Kevin Stanford (17 at the time he committed murder) and Heath Wilkins (16 when he committed murder). Again, the Court looked to state statutes. As Justice Antonin Scalia said, "The audience for these arguments, in other words, is not this Court but the citizenry of the United States. It is they, not we, who must be persuaded. . . . [O]ur job is to *identify* the evolving standards of decency"; to determine not what they *should* be, but what they *are*." (*Stanford v. Kentucky*, 57 U.S.L.W. 4973 (June 26, 1989).)

In the civil-rights cases, the Court also pushed issues away from the judiciary toward the political branches. The decisions dismayed the civil-rights community—but those advocates should be prepared to do battle in every arena: judicial, legislative, executive, and the states. One decision, *Wards Cove Packing Co. v. Atonio*, 57 U.S.L.W. 4583 (June 5, 1989), shifted the burden to employees to prove that statistical racial disparities in the work force result from employment practices and are not justified by business needs. Since the decision is a statutory interpretation of Title VII of the Civil Rights Act of 1964, Congress can rewrite the act and overturn the Court—and legislation has already been introduced to do precisely that.

Patterson v. McLean Credit Union, 57 U.S.L.W. 4705 (June 15, 1989), limited the reach of 42 U.S.C. §1981, which gives blacks the same right as whites to "make and enforce contracts." Brenda Patterson, a black woman, claimed that

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her employer had harassed her, failed to promote her, and discharged her for reasons of race. The Court decided that §1981 is limited to prohibiting discriminatory actions *before* someone is hired, not after, and advised Patterson that she should have acted under Title VII. Title VII is not a full substitute for §1981, but nothing prevents Congress from changing §1981 to prohibit racial harassment on the job.

Another case upsetting to civil-rights groups is *Martin v. Wilks*, 57 U.S.L.W. 4616 (June 12, 1989), which gave white men new authority to challenge consent decrees that embody court-approved affirmative-action plans. To avoid future challenges, consent decrees must now reach out to all groups that might be affected. How much this will complicate affirmative-action settlements is unclear. Since the Court decided the case by interpreting the Federal Rules of Civil Procedure, Congress could enter the fray and reverse the Court. As a practical matter, however, the lack of public consensus on affirmative action makes the prospects for legislative action dim.

Webster v. Reproductive Health Services, 57 U.S.L.W. 5023 (July 3, 1989), was promptly denounced by pro-choice advocates, who rebuked the Court for sending the volatile abortion question back to the states, inviting further political strife and repressive legislation.

Politicizing Abortion

But does the pro-choice community really want a definitive resolution from this Court—especially after Justices Harry Blackmun, William Brennan Jr., and Thurgood Marshall retire? By relying on the benign intervention of the national judiciary, abortion-rights supporters have discouraged grass-roots organizational efforts at the state and local levels. Those who support a woman's choice must now compete on an equal basis with anti-abortion activists, who have lobbied state legislatures effectively ever since *Roe v. Wade*, 410 U.S. 113 (1973).

The Court will most likely conduct further retreats from *Roe*, offering little resistance until the ultimate question is posed: May states criminalize abortion? At some point in the next few years the Court may have to decide whether states have it within their power to punish women and physicians who decide to abort. Meanwhile, the states will scatter in different directions. In jurisdictions that deny the use of public funds and public facilities, a greater burden will fall on private clinics. Citizens who support a pro-choice policy will have to contribute their own money. Politicizing the issue need not deprive women of the fundamental right to abort early in their pregnancy.

Despite their reaction to the flag-burning case, politicians are capable of resolving constitutional issues.

It is shortsighted to assume that constitutional rights are jeopardized whenever legislatures act. Only by focusing single-mindedly on the years of the Warren Court can one equate judicial action with the protection of minority rights. For most of its history, the record of the Court in safeguarding individual rights and liberties has been mediocre. Those values need the active support and understanding of elected officials and the public. For example, *Brown v. Board of Education*, 354 U.S. 483 (1954), had little practical impact until Congress passed the Civil Rights Act of 1964.

Almost every year Congress enacts legislation to reverse, modify, or enforce Supreme Court rulings. Reversals typically involve statutory construction, but constitutional values are usually implicated. For example, last year:

- Congress passed legislation to overturn *Westfall v. Erwin*, 108 S. Ct. 580 (1988), which held that federal employees could be sued for common-law torts committed on the job. The new statute protects federal employees from personal liability for common-law torts committed within the scope of their employment. 102 Stat. 4563 (1988).
- Another law reversed *Traynor v. Turnage*, 108 S. Ct. 1372 (1988), which had accepted the executive branch's position that alcoholism results from "willful misconduct" rather than from a disease. Legislation now provides that veterans seeking education or rehabilitation will not be denied those benefits under the willful-misconduct standard. 102 Stat. 4170, §109 (1988).
- Finally, Congress adopted a law to overturn *Grove City College v. Bell*, 465 U.S. 555 (1984). The legislative process took four years because the initial issue of denying federal funds to institutions that discriminate on the basis of sex became entangled in church-state and abortion questions. 102 Stat. 28 (1988).

Asking the political branches to resolve constitutional issues may seem hopeless in light of the impulsive response to the flag-burning case of *Texas v. Johnson*, 57 U.S.L.W. 4770 (June 21, 1989). Most of the statements from President Bush and members of Congress have been politically reactive; their behavior inspires little confidence in their ability to debate and analyze constitutional matters. But flag-burning is hardly a run-of-the-mill issue and is not a fair standard for measuring the competence and trustworthiness of the legislative and executive branches. They protect constitutional values as well as the courts and probably better.

By forcing the death-penalty and civil-rights issues back into the legislative arena, at both the federal and the state levels, the Court has done what it has always done: engage in coordinate construction. Only in rare moments is there a compelling need for an authoritative and binding decision by the Supreme Court. The unanimous ruling in *Cooper v. Aaron*, 358 U.S. 1 (1958), signed by each justice, was essential in dealing with the Little Rock school-desegregation crisis. Another unanimous decision—*United States v. Nixon*, 418 U.S. 683 (1974)—disposed of the confrontation between President Richard Nixon and the judiciary regarding the Watergate tapes.

But for the most part, Court decisions are tentative and reversible like other political events. To equate the Court with the Constitution is to place on the Court an institutional burden it cannot carry and to relinquish individual responsibility and the capacity for self-government. □

How the States Shape Constitutional Law

State courts have frequently run ahead of the more visible Supreme Court in protecting individual rights.

Louis Fisher

While the U.S. Supreme Court enjoys the reputation of issuing the "last word" on constitutional law, the reality is quite different. Instead of a hierarchical system, with each issue percolating up to the Court for an ultimate determination, the process is pluralistic and decentralized. The other branches of government – legislative and executive – perform key roles. States, too, contribute.

The federal constitution provides only a minimum, or a floor, for the protection of individual rights. State governments are free to grant greater rights to their citizens. As noted by the Supreme Court in 1980, each state has the "sovereign right to adopt in its own Constitution individual liberties more expansive than those conferred by the federal government."

State courts rarely receive credit for taking the initiative. At most, their innovations are cited obliquely in a decision by the Supreme Court, which then gets the credit. The Warren Court was praised for issuing *Gideon vs. Wainwright* (1963), which granted indigent defendants the right to counsel provided by the government. Yet states had already recognized that right. The Supreme Court of Indiana in 1854 stated that "a civilized community" could not prosecute a poor person and withhold counsel. In 1859 the Wisconsin Supreme Court called it a "mockery" to promise a pauper a fair trial but tell him he must employ his own counsel.

The "exclusionary rule" illustrates the initiative of state courts. In 1914 the Supreme Court ruled that papers illegally seized by federal officers had to be excluded in federal court as evidence. Some states had already adopted that policy. The Iowa Supreme Court announced in 1903 that the admission of evidence illegally obtained would "emasculate" the constitutional guarantee in the state constitution against unreasonable searches and seizures. When the Supreme Court applied the exclusionary rule to all of the states in 1961, it acknowledged that states were moving increasingly in that direction anyway.

The exclusionary rule leaves plenty of room for state independence. Evidence admissible in federal court is not necessarily admissible in state court. The differences between federal and state standards are clear from the 1984 *Leon* case. The Supreme Court held that when a search results from a defective warrant, the incriminating evidence can nevertheless be admitted if police believe they are acting in "good faith" that the warrant is valid. Several states, including Michigan, Mississippi, New Jersey, New York and Wisconsin, have refused to adopt the *Leon* doctrine for state constitutional law. They fear that the test will undermine the probable-cause requirement for searches and seizures.

Two search-and-seizure cases illustrate the freedom of states to develop more stringent standards. In 1980 the Supreme Court of Washington held that a police officer had exceeded his authority in seizing incriminating evidence in a student's room. The U.S. Supreme Court reversed

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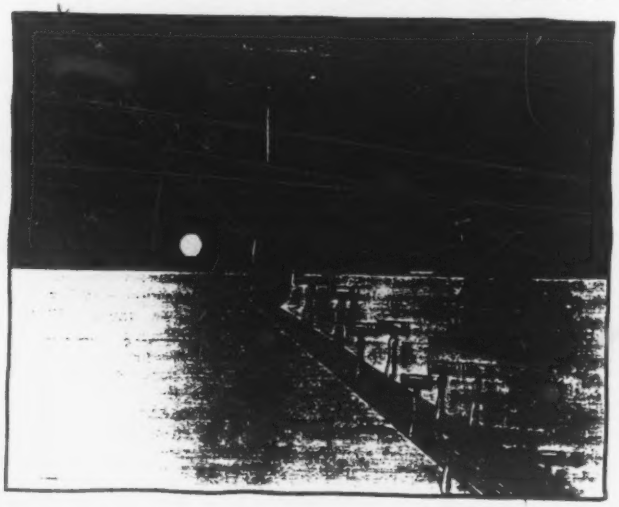

the decision, using the "plain view" doctrine to uphold the seizure, and sent the case back to the state court. On the next go-round the Supreme Court of Washington, basing its opinion solely on the constitution and laws of the state, concluded that it was right the first time and found the officer's actions impermissible.

The other example also comes from Washington. In 1982 the U.S. Supreme Court in *Ross* issued an extremely broad reading of the "automobile exception" to the warrant requirement for searches and seizures. Police who legitimately stop an automobile, and have probable cause to believe that it contains contraband, may conduct a warrantless search as thorough as a magistrate could authorize by warrant. A year later, the Supreme Court of Washington rejected this doctrine. What is permissible under federal constitutional law is thus forbidden by Washington law.

School issues demonstrate the diversity between state and federal constitutional law. Consider the area of church and state. In 1947 a sharply divided Supreme Court upheld a New Jersey statute that reimbursed parents for the cost of sending their children to parochial schools on public buses. In 1968 the Court sustained a New York law that "lent" textbooks free of charge to students in sectarian schools. The Court reasoned that the statute benefited parents and children, not schools.

State courts from Alaska to Washington, interpreting highly restrictive language in their constitutions, refused to uphold transportation and textbook assistance to sectarian schools. State constitutions are often quite specific in prohibiting the appropriation of public funds for any religious worship or instruction. The Alaska Supreme Court dismissed the U.S. Supreme Court's 1947 decision as "unpersuasive." Many state courts also rejected the "child-benefit" theory embraced by the high court. The California Supreme Court said that in most instances the theory "leads to results which are logically indefensible."

Another education issue is the nationwide dependence on property taxes to finance elementary and secondary schools. As a result, rich communities can afford better schools than poor neighborhoods. In 1973 the Supreme Court, split 5–4, denied that this financial system violates the Equal Protection Clause. The Court may have concluded that it lacked the legitimacy or power to dictate funding levels in public schools in all 50 states.

State courts reached different results. The Supreme Court of New Jersey held in 1973 that the state system of financing public education created unconstitutional variations in spending per pupil. The court explained that the principle of federalism, which limits activism by the federal courts, does not prevent states from coping "with their own problems in the light of their own circumstances." The courts of California, Connecticut and Wyoming have all decided that property taxes violate state responsibilities to provide an equal educational opportunity for all children.

State legislatures have been restructuring their financing systems to provide more equitable funding for schools in poorer communities. Litigation continues to test the constitutionality of these efforts. State courts discover that merely issuing a decision does not automatically produce an acceptable allocation of funds by the state legislature.

Free-speech issues include the efforts of citizens to express their views on private property. In 1980 the Supreme Court held that when the U.S. Constitution does not protect free-speech rights at a privately owned shopping center the states may independently protect such rights by interpreting their own constitutions. It thus affirmed a decision by the California Supreme Court the previous year upholding the rights of students to solicit signatures at a shopping center.

States may reach different results because their constitutions are often far more explicit than the U.S. Constitution in protecting the rights of speech and assembly. Partly because of the broad scope of language in the New Jersey constitution, the New Jersey Supreme Court in 1980 upheld an individual's right to distribute political literature on the campus of Princeton University. A year later the Supreme Court of Pennsylvania supported the right of anti-war protesters to distribute leaflets at Muhlenberg College. And the Washington Supreme Court supported the effort of environmentalists to gather initiative signatures at a shopping center.

Privacy means different things at the federal and state levels. In 1980 the Supreme Court upheld the Hyde Amendment that Congress had passed to deny federal funds to indigent women seeking an abortion. Nevertheless, some of the state courts struck down Hyde-like amendments enacted by state legislatures. The California Supreme Court, rejecting the state's restriction as unconstitutional, acknowledged that the legislature has no obligation to provide any funds to pay for medical care for the poor. However, once such assistance is made available, the state bears a heavy burden when withholding benefits from qualified individuals who choose to exercise their constitutional right to have an abortion. The New Jersey and Massachusetts courts also overturned state laws that restricted funding for abortions.

Questions of privacy sometimes involve the rights of adults to read "obscene" matter. For 15 years the Supreme Court struggled to define obscenity. In 1973 it announced several criteria, including whether the "average person, applying contemporary community standards," would find that the work, taken as a whole, appeals to the prurient interest. The Oregon Supreme Court has rejected these guidelines. The state court could not justify prosecuting someone who failed to meet such a vague notion as contemporary standards. State citizens would be forced to guess about a future jury's estimate of contemporary state standards of "prurience."

The Oregon court also explained that the state constitution offers greater protection to speech than the federal constitution. The state constitution reads: "No law shall be passed restraining the free expression of opinion, or restricting the right to speak, write or print freely on any subject whatever; but every person shall be responsible for the abuse of this right." Moreover, the 1973 national guidelines on obscenity ran counter to Oregon's political and social culture. Most of the members of the state's constitutional convention of 1857, said the Oregon court, "were rugged and robust individuals dedicated to founding a free society unfettered by the governmental imposition of some people's views of morality on the free expression of others." No state law could prohibit or censor any person from writing, printing, reading, saying, showing or selling anything to a consenting adult "even though that expression may be generally

or universally considered 'obscene.'"

A similarly independent spirit appears in a 1975 opinion by the Alaska Supreme Court, which held that the state could not prohibit adults from using marijuana in their homes. The decision rested in part on the explicit provision for privacy in the state constitution: "The right of the people to privacy is recognized and shall not be infringed." The court said that this privacy amendment was intended to protect activities in the home. Another factor was the unique character of citizens in Alaska, "the home of people who prize their individuality" and desire "a measure of control over their own lifestyles which is now virtually unattainable in many of our sister states."

The "renaissance" in state constitutional law deserves a few caveats. Because of *Michigan vs. Long* (1983), state courts must make clear that their rulings rest exclusively on the constitution and the laws of the state. If state courts base their decisions on "bona fide separate, adequate and independent grounds," the U.S. Supreme Court will not undertake a review.

Most state innovations are limited to a handful of commonwealths, including California, New Jersey, Oregon, Washington and Wisconsin. For the most part, state inertia still follows Supreme Court precedents. Even in states willing to step out front, rulings by state high courts are not automatically implemented. State legislatures can resist, and do resist, judicial decisions requiring new funding. As the Supreme Court noted in 1973, ". . . the ultimate solutions must come from the lawmakers and from the democratic pressures of those who elect them." Edicts from state courts spark a series of dialogues between the judiciary and the legislature until a consensus emerges.

State judges who antagonize voters can expect penalties not exacted at the federal level. They can be defeated for re-election, the fate suffered in 1986 by three members of the California Supreme Court. Although it is extremely difficult to amend the federal constitution to overturn the U.S. Supreme Court, unpopular decisions by state courts can be more easily rejected through constitutional amendments. In 1972 the Supreme Court of California held that the death penalty violated the ban against cruel or unusual punishment in the state constitution. Within nine months the voters of California had amended the state constitution to reinstate the death penalty.

Innovations in state constitutional law satisfy the values we place on diversity, pluralism and a distrust of centralized government. However, state courts receive mixed signals. Consider the conflicting positions of Justice William Brennan. In 1977, for the *Harvard Law Review*, he strongly encouraged the states to assert their roles as independent defenders of individual liberties. Yet that very year, in *Juidice vs. Vail*, he rebuked the Court for returning a case to New York courts for disposition. His critique reflects little confidence in most states: "Under the banner of vague, undefined notions of equity, comity and federalism, the Court has embarked upon the dangerous course of condoning both isolated . . . and systematic . . . violations of civil liberties." Faced with this record, prudent attorneys will carefully forum-shop before filing in state court. ■

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Chairman DERRICK. Can either one of you think of any valid policy argument for having the pocket veto apply any time other than after a final sine die adjournment?

Mr. SPITZER. Well, I think given the assumption that I make that the return veto is preferred, as long as there is a means by which a return veto can be employed, the answer would be no and that would—certainly under modern circumstances, that would pretty much bring one to the instance of the end of a Congress.

So I think if you assumed, if you take that assumption, I think it leads you very quickly to the conclusion that you want to use the return veto whenever you can and it is only when you can't that you go to the pocket veto and that means sine die adjournments.

Chairman DERRICK. You didn't address this as forcefully as Dr. Fisher, but is there any doubt in your mind that the Congress has the power to enact this legislation?

Mr. SPITZER. I make no claims to being a constitutional lawyer, but certainly history and politics are replete with countless examples and Lou mentioned a few of them. It seems to me that there is simply no question about that.

Chairman DERRICK. Do you think that the Constitutional Convention meant this strictly to be a housekeeping matter?

Mr. SPITZER. Which are you referring to?

Chairman DERRICK. The pocket veto.

Mr. SPITZER. Housekeeping in what sense?

Chairman DERRICK. As opposed to a substantive issue. Are they telling us what to do, or are they outlining the structure for doing it?

Mr. SPITZER. It is clearly very circumstantial. It addresses a very particular circumstance. The President was not to have an absolute veto and that was discussed really a great number of times.

Chairman DERRICK. It was really not discussed at any great length, though, the pocket veto.

Mr. SPITZER. It was not. The logic for it trails back to where the idea of the veto in that form came from, which is the New York State Constitution of 1777. It was this notion of trying to guard against this circumstance which seems a bit arcane in modern circumstances where Congress would try to duck a veto by passing a bill and quickly adjourning before the President has a chance to respond.

That was very much on their minds. That circumstance was a concern.

Given that concern, and the wording of the Constitution, tying two very important concepts, tying adjournment to the ability to return a bill, and it is not useful to talk purely about the adjournment question in the wording itself, I think the Constitution says adjournment with an ability to return the bill. If there is an ability to return the bill——

Chairman DERRICK. And there is unless we have adjourned our final session sine die.

Mr. SPITZER. That is right. The main wording of the Constitution speaks directly to the highly circumstantial nature of the pocket veto.

Within that framework, I think this interpretation is perfectly reasonable and perfectly appropriate.

Chairman DERRICK. Yes.

Mr. FISHER. To comment on the question you raised, is there any reason in your bill why the President should be able to exercise a pocket veto either within a session or between, if I could understand that this in some way threatens Presidential power, some core function of the President, I could accept that, but I don't see this in any sense endangering or threatening Presidential powers.

And the notion that the Justice Department advances, that any time you go away for more than 3 days, he may pocket veto, is something that even President Reagan did not accept within a session. They lived with the restriction that within a session you could not exercise a pocket veto at all. So I don't see this as threatening.

If you go back to the *Pocket Veto* case of 1929, the Court seemed bothered by the fact that there was uncertainty; a 5-month adjournment was in effect at that time. I don't even see that as persuasive because there is uncertainty in other parts of the veto process.

If you were to send a bill to the President early in the first session and he vetoes it and the message comes back to you, you don't have to act right away even though the Constitution says you will, you shall proceed. You may go wait until the next session for the override attempt.

There are many uncertainties. I think that is much less important than making sure that each branch, executive and legislative, has the two fundamental powers that I mentioned, and that is protected in your bill.

Chairman DERRICK. The textile bill comes to mind. We held that for 6 or 8 months.

Mr. Chairman, do you have any questions?

Mr. MOAKLEY. No, Mr. Chairman, I don't. Thank you.

Chairman DERRICK. Lynn.

Mrs. MARTIN. No.

Mr. FROST. No questions.

Mr. WHEAT. I have a couple.

Chairman DERRICK. Mr. Wheat.

Mr. WHEAT. I have a couple questions. Thank you, Mr. Chairman.

You both stressed the difference between the modern era and earlier times. When you talk about modern circumstances not preventing the return of a bill, what are you saying is the difference between the two time periods?

Mr. FISHER. There was a period—and Bob Spitzer goes into it in his book—where Presidents would come down on the last day of the session and literally sit here. That has not been necessary for a long time. Each House has authorized agents to receive veto messages, just as the White House has authorized clerks to receive bills when the President is traveling.

There has been a fundamental change in terms of authorized officials in each branch to substitute for the elected officials and there has been a fundamental change in the shortness of recesses and adjournments. The general pattern is to adjourn for about a month within a session and about a month or 2 months between sessions. So those two factors together show that the President is not prevented in returning veto messages.

Mr. WHEAT. In trying to judge the constitutionality of the entire situation, are you basing it strictly on the practicality of it 150 years ago, or are you saying with adjournment 5 months and with the difficulty of Congress being able to reassemble in Washington that the constitutionality would have been different?

Mr. FISHER. The courts do in those cases from *Wright* in 1938 and the *Kennedy* cases and the *Barnes* case take practicality into account, and that is considered a valid constitutional concern.

Whatever impacts of delay there were a century ago do not prevail today.

Mr. WHEAT. Let me ask you about the length of time for an intersession adjournment. Suppose we adjourned in January, left in late September and we didn't come back until late January the next year. Does that length of time, in and of itself create some problem in terms of that question?

Mr. FISHER. Bob can comment on this, too, but I don't think it affects his ability to return a veto message. Once you do that, you start to recreate some of the conditions that led to the Supreme Court in 1929 to decide as it did and I think the *Barnes* case in 1985 makes it clear that Congress might expand the pocket veto if it changes some of its practices.

Mr. WHEAT. Thank you, Mr. Chairman.

Chairman DERRICK. Mr. Gordon.

Mr. GORDON. No questions. Thank you.

Chairman DERRICK. Let me ask you one more question and then I will let you go.

Do you consider this an institutional issue, not a Democratic or Republican issue or anything like that?

Mr. SPITZER. It certainly would strike me as an institutional question. I would agree with that.

As a matter of politics, I suppose when you study attitudes toward—I think some would view this, might view this issue as a touchstone on Executive power, sort of a litmus test on Executive power. I think that would be a mistake. That would be a mistake because taking the wording of the Constitution, taking the intent of the Framers, taking modern practices, taking the way the legislature operates today, I mean, simply in terms of quantity and quality the Congress deals with so much more than it did 50, 60, 70, or 80 years ago.

Given the nature of its responsibilities, given also the adaptations that it has made, the two sort of objections that the *Pocket Veto* case raised, one bill sort of languishing in limbo between the branches—this was a concern expressed. And second, the use of designated agents, both of these are essentially subjects that have been dealt with and resolved.

After all, the President's legally designated agent to receive bills is the Office of the Executive Clerk and there is no less of a problem designating agents for the executive branch than for the legislative branch. So this sort of combination of the constitutional principle with the modern procedures today I think leads one to an ability to resolve this kind of technical question.

It would be unfortunate if it were framed in partisan terms because I don't think it is that kind of issue and shouldn't be viewed as such.

Mr. FISHER. I would agree that there is no reason for it to be partisan. It was a partisan confrontation in the 1970's. But under a Republican administration, the Ford administration, and the Carter Democratic administration, those two Presidents were able to reach accommodations that met the needs of both branches.

They looked at it in institutional terms and I think we can recreate that. We could have done it informally, during the Reagan administration, but that collapsed. Now we can do it in bill form and I don't see that Executive powers are jeopardized in any manner.

Mr. DERRICK. As I recall, you indicated you thought there were improvements that could be made in this legislation.

Mr. FISHER. Yes. Just on specifying the designated agent and specifying the business carrying over, because the D.C. Circuit in 1985 felt those were important ingredients in restricting the pocket veto.

Chairman DERRICK. Thank you.

Any other questions?

If not thank you both very much.

Mr. Moakley.

Mr. MOAKLEY. Thank you, Mr. Chairman.

I have some meetings this morning, but I would like to commend you for your leadership in presenting the pocket veto issue to the Committee on Rules. There is a difference of opinion between the Ways and Means Committee and the Appropriations Committee on who writes tax laws, and it makes it impossible for me to stay for the hearing, but I will follow the subcommittee's reports very closely. I would like to assure the subcommittee my vigorous support for your efforts.

There is far too much willingness on the part of Congress to overly rely on the courts to preserve its privileges. It is an unfortunate trend for several reasons. First, the separation of powers doctrine was intended by the Founding Fathers to vest in each branch not only their reserved powers but the institutional strength to protect those powers. The courts have their own powers to protect and it is properly imprudent for us to passively expect the Judiciary to do our job.

Second, Mr. Chairman, I am concerned that the increasing recruitment of the Federal Judiciary from the ranks of the administration alumni creates Federal courts with a predisposition to the Executive, and I don't use the word "prejudice" but again it is imprudent to rely overly on the sympathy for congressional privileges from a judge whose own prior government experience is as a U.S. attorney.

The forum provided by the chairman, Mr. Derrick, is entirely the appropriate way to face the pocket veto issue. I commend you for your leadership, and my colleagues for their interest in your efforts.

As I say, I have got meetings this morning with a couple of committees trying to work out something, and I hope that your endeavor is more successful than mine may be.

Thank you.

Chairman DERRICK. Thank you.

Mr. Barr, please, Assistant Attorney General, Office of Legal Counsel, U.S. Department of Justice.

Mr. Barr, we appreciate your coming this morning and I appreciate your testimony.

Mr. BARR. Thank you, Mr. Chairman.

Chairman DERRICK. We will be glad to have you insert your statement in the record and, without objection, you can read it all or summarize it or proceed however you wish.

Mr. BARR. Thank you, Mr. Chairman.

STATEMENT OF WILLIAM P. BARR, ASSISTANT ATTORNEY GENERAL, OFFICE OF LEGAL COUNSEL, U.S. DEPARTMENT OF JUSTICE

Mr. BARR. Mr. Chairman, members of the subcommittee, I appreciate the opportunity to present the views of the Department of Justice concerning H.R. 849, a bill to define the type of adjournment that prevents the return of a bill by the President, and to amend the Rules of the House of Representatives to require the Clerk to make certain notifications to the Speaker.

The Department opposes enactment of this legislation, and would recommend disapproval were it presented to the President.

Mr. Chairman, I ask the full text of my statement be entered into the record in its entirety.

Chairman DERRICK. Without objection.

Mr. BARR. Mr. Chairman, the Constitution sets forth very clear rules on the process by which laws are made. Recently in the *Chadha* case, the Court emphasized how far it is that the rules of the game remain unambiguous and clear even if it means a sacrifice in efficiency.

In *Chadha,* the argument was under the modern conditions and modern administrative state, it was far more efficient to permit legislative veto, and the Court rejected that argument, and said that the Constitution has a blueprint, a set of rules by how laws come into being. They are not always efficient, but the rules have to be observed, because the worst thing that can happen under our Constitution is there to be ambiguity and confusion when a law becomes a law.

So they rejected the efficiency argument. After all, they said, a 10-day rule for the President to review legislation—and, as we know, at the end of a Congress or the end of a session of Congress, there are a lot of bills to be reviewed, some of them several feet high—10 days is, under modern circumstances, not very long to review legislations.

Should we say, under modern conditions, why don't we pass a bill and double that time or triple that time because things have changed? No. There are two ways to change the Constitution. Well, there is one way to change the Constitution, and that is through an amendment.

If the Department of Justice is wrong on its interpretation of the Constitution, then as the Court told us as early as *Marbury* v. *Madison,* it is emphatically the duty and province of the Supreme Court to say what the Constitution means.

So our view is that Congress cannot change the meaning of the Constitution by passing a statute defining what the word adjournment means for purposes of pocket veto clause.

Now, a lot has been made of this argument that the pocket veto really gives an absolute veto to the President. That argument was made in the first time pocket veto was considered by the Supreme Court, and was rejected.

In the *Pocket Veto* case, the Court said this is not an absolute veto, this is not an expansion of Presidential power, that Congress has the built-in capacity to avoid the pocket veto by staying in session for 10 days to permit the review by the President and then rapid reconsideration should the President veto the bill, return veto the bill.

So it is always within the power of the Congress to avoid a pocket veto and it said the party responsible for a pocket veto, that responsibility lies with Congress, not the President.

This is not a question of expanding Presidential powers. We think the Court was right in that decision.

Now, the basic issue here is, what is the real reason behind the pocket veto clause? There are basically two schools of thought.

One is the ducking Congress school of thought. The only reason behind the pocket veto clause was to protect the President if the Congress was going to be ducking out after passing a bill and evade service of process, so to speak. That is the only purpose according to this school of thought.

All we have to do is provide a mailbox. If we provide a mailbox and a registered agent to accept service of process, then the whole problem of the ducking Congress is gone and we can just ignore what the Constitution says.

That is the underlying rationale for this bill. We think it is wrong. We think, one, it does not comport with the history of the Constitutional Convention by adoption of this clause, it is inconsistent with the language of the clause, and it contradicts the two Supreme Court decisions that have interpreted the clause.

In the Constitutional Convention, the original—in practical terms, the effect of requiring the President to deliver a bill to the Clerk for subsequent delivery to the House would be the same practically as if the President simply retained the bill and returned it directly to the House or to the Congress when Congress returned from its adjournment on the first legislative day. That, in fact, was the first proposed pocket veto clause.

The first draft given to the committee on detail during the Constitutional Convention said, "Unless the Legislature, by their adjournment, prevents return"—that is very close to the existing language. And then it says, "In which case, it shall be returned on the first day of the next meeting of the Legislature."

So they had a clause that solved the ducking Congress problem initially proposed to the committee on detail, saying the President could hold on to the bill, and as soon as Congress came back, boom, he gives them a return veto.

The committee on detail changed it. They took out that last proviso and have gone with the automatic pocket veto. There is no provision whereby it is held in abeyance until the Congress returns from adjournment.

We think that that reflects that the Convention had other interests besides the ducking Congress problem. That was brought to our attention in the Supreme Court's *Pocket Veto* case. There, the

Court said an adjournment in the clause does not mean final adjournment. That is what this bill is trying to define it as. It doesn't mean a final adjournment.

The word adjournment in the Constitution can mean adjournment even for 1 day, and it is used throughout the Constitution to mean adjournments of various lengths including from day to day. So they said the word adjournment doesn't mean just final adjournment.

They said that part of the reason—our reading of the case is that the Court was saying that the reason an adjournment prevents a return is because it was the purpose of the Framers to have the Legislature present with the capacity to give immediate consideration. That is used repeatedly throughout that case, immediate consideration to the veto.

They wanted a process whereby the confrontation between the Executive and the Legislature, which they considered to be a momentous occasion, very important, solemn occasion, the President has a solemn duty to review the legislation. He is given 10 days to do it. When he vetoes, they wanted again this confrontation to be capable of immediate resolution, immediate consideration in Congress. That is why the Court, in the *Pocket Veto* case, said that the House must be in session and the return must be made to the House sitting in an organized capacity with the ability to act immediately.

They rejected the notion in that case that delivery to an agent could comply with the constitutional mandate, and said that would permit delay in reconsideration, which the Constitution intended to avoid.

We think that the *Pocket Veto* case makes it clear that an adjournment prevents return because Congress is not then in a circumstance where it can proceed immediately to reconsider or to consider the objections of the President and determine whether to override the veto.

So we think that part of the rationale for the pocket veto clause was the ducking Congress problem, but there was another reason, which was to eliminate or to minimize periods of uncertainty, to focus the debate on to permit the legislative process to rapidly resolve and immediately address differences that arose between the Executive and Congress.

The *Wright* case that came along 9 years later, we think, is completely consistent with the *Pocket Veto* case. There, the Court had the insight to say that the clause requires or contemplates an adjournment by Congress, not adjournment by one of the Houses. And it referred to another clause in the Constitution which requires the House that goes into adjournment for more than 3 days to obtain the consent of the other House.

We think this is consistent with the Supreme Court in *Wright* and the *Pocket Veto,* that adjournment of Congress is the key concept in the clause and it is a concept that is capable of mechanical application, and therefore leads to clear results and predictability. If Congress is in adjournment, then the President can pocket veto a bill and it doesn't matter whether or not there is an agent there. If Congress is not in recess, but not in adjournment, the President has to use the return veto.

We think that where one House seeks the consent of another House and goes out on a recess for more than 3 days, you have bicameral action, which constitutes an adjournment of Congress. Congress is then adjourned even if one House remains in session because you have had bicameral action.

Where a House goes out on a brief recess and does not obtain the consent of the other House because it is not going to be over 3 days, then Congress remains in session and not adjourned for purposes of the pocket veto clause. Congress is not adjourned.

Under those circumstances, the pocket veto clause is not applicable and the President has to return veto because Congress is not adjourned and he can return it in any way suitable. If Congress wants him to return it to an agent, fine, Congress is not adjourned at that point.

Let me just say a few words about history. The Court has repeatedly said that history—history here I don't think supports the sweeping bill that is before the committee now, historical practice.

In any event, the Court has repeatedly said that historical practice is never sufficient alone to alter the meaning of the Constitution. The Court will occasionally look at historical practice where there is ambiguity and reasonable arguments can be made on both sides, and they will look to see what the practice has been.

But as far as the meaning of the Constitution is concerned, the reason the Court has looked to the First Congress and the practices of the first Congress—which was the example cited by one of the witnesses up here before, the removal power issue—is because the Court has said that Members of the first Congress, a majority of them were also involved in the drafting and ratification of the Constitution, and therefore maybe they had a good idea of what the Constitution meant. And then the Court will look to see whether or not there was explicit consideration of the issue at hand by the Members of the First Congress.

If there was not explicit consideration given to the issue, then their practice is entitled to very little weight. If they explicitly considered something and discussed this constitutionality question and came to a conclusion on it, their views are entitled to very great weight. The removal power case is just that example.

There was extensive debate in the early Congresses over the President's removal power and what the Constitution contemplated. That is why the history of the First Congress and the debate over removal was given such weight.

But we would not accept the notion that the Constitution is—when we say it is a living document, we don't mean it to be a blank check and that the rules set in there are things that Congress can change simply by passing a statute.

Adjournment means adjournment, and the Supreme Court's interpreted that term, and we can litigate it again in the Supreme Court and maybe the Justice Department will lose, in which case we will be told by the Supreme Court what the clause means. Otherwise, the way to change the Constitution is by constitutional amendment.

I would be glad to answer any questions.

[Mr. Barr's prepared statement follows:]

STATEMENT

OF

WILLIAM P. BARR
ASSISTANT ATTORNEY GENERAL
OFFICE OF LEGAL COUNSEL
UNITED STATES DEPARTMENT OF JUSTICE

BEFORE

THE

SUBCOMMITTEE ON THE LEGISLATIVE PROCESS

OF THE

COMMITTEE ON RULES
UNITED STATES HOUSE OF REPRESENTATIVES

CONCERNING

H.R. 849

JULY 26, 1989

Mr. Chairman, Members of the Subcommittee

Thank you Mr. Chairman. I appreciate the opportunity to present the views of the Department of Justice concerning H.R. 849, a bill "to define the type of adjournment that prevents the return of a bill by the President, and to amend the Rules of the House of Representatives to require the Clerk to make certain notifications to the Speaker."

The Department opposes enactment of this legislation and would recommend disapproval were it presented to the President.

H.R. 849 would add a new section to Title 2 of the United States Code and would amend the Rules of the House of Representatives. The new section, to be numbered 115, would state that "[n]o adjournment of either House of Congress, other than an adjournment sine die to end a Congress, prevents the return of a bill by the President." I will comment only on this proposed addition to Title 2.

The issue that this legislation purports to address -- whether an adjournment of a House of Congress prevents the President from returning a bill that has passed both Houses -- is significant because of the Pocket Veto Clause of Article I, section 7 of the Constitution. The Pocket Veto Clause is a proviso attached to the portion of the Constitution that prescribes how laws are to be passed. Under Article I, section 7, when both Houses of Congress pass a bill they present it to the President. If he signs the bill, it becomes law. He can also veto it by returning it to its house of origin together with

his objections. If the President neither signs the bill nor returns it within ten days of presentment (excepting Sundays), it becomes a law "in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which case it shall not be a law." The underlined passage is the so-called Pocket Veto Clause. It makes it possible for the President, when Congress is adjourned, to veto a bill without returning it simply by failing to sign it.

The pocket veto makes it impossible for Congress, by adjourning, to nullify the President's power of return veto authority; if there were no pocket veto, Congress could pass legislation and adjourn, preventing the President from exercising the veto. Similarly, the ten-day rule to which it is attached is an action-forcing mechanism in the other direction, one that makes it impossible for the President to veto a bill informally by neither signing nor returning it.

We have two objections to H.R. 849, which purports to address the operation of the Pocket Veto Clause. First, we think that the bill, considered as a statement of constitutional law, is incorrect: in fact, the Constitution implies that any adjournment by the Congress -- that is, any adjournment of either house for longer than three days -- gives occasion for a pocket veto. Second, we think that it is inappropriate for Congress to attempt to impose its own view of the Constitution by legislative fiat. Whether an adjournment prevents a return must be decided

by interpreting the Constitution, the meaning of which can be changed only by a constitutional amendment, not by legislation.

The answer to the substantive question concerning the operation of the pocket veto depends on two subsidiary questions: first, what is an adjournment of Congress for purposes of the Pocket Veto Clause, and second, what relationship does the Constitution imply between adjournments and the prevention of a return.

The Constitution answers the first question in a fairly direct fashion. The Pocket Veto Clause refers to the case where "Congress, by their Adjournment prevent [a bill's] return." Congress is a collective body consisting of two Houses, and the Constitution explicitly states which decisions to go out of session require an action by Congress collectively: Article I, section 5, states that neither House "during the Session of Congress, shall, without the Consent of the other, adjourn for more than three days."[1] The Constitution thus implicitly defines any adjournment by either or both Houses of more than three days as an adjournment of Congress. When one or both Houses stop work from day to day or over a weekend, there is no adjournment of Congress.

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[1] The Constitution exempts the decision to adjourn from the requirement of presentment to the President: that requirement applies to "[e]very Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment)." Art. I, § 7, cl. 3.

This definition of an adjournment of Congress fits neatly into the Constitution's structural scheme. Congress, considered as an independent and coequal branch of the national government along with the President and the courts, consists of two Houses -- indeed, the bicameral nature of Congress reflects the Great Compromise between the small and large States, which made the Constitution possible. The President, when he deals with Congress, deals with both bodies; for example, his messages on the state of the Union are delivered to both Houses, and Article I, section 7 provides that the President acts on a bill only when both Houses have passed it. Thus, it is proper that the Constitution provide that Congress has adjourned when either House is gone for any substantial period of time.

As to the second question, it is implicit in the Constitution and in the very language of the Pocket Veto Clause itself that adjournments of Congress by definition prevent the return of a bill and thus create an occasion for the pocket veto. We believe that this reading is decisively to be preferred to the alternative, under which only some adjournments prevent return, and under which it would be necessary to determine whether any particular adjournment has done so. First, and perhaps most importantly, the reading we suggest is the more plausible because it makes the Pocket Veto Clause a clear rule capable of mechanical application, without any need to inquire into the effects of whatever arrangements Congress has made for its adjournment.

This is very significant, because the most natural reading of any structural provision of the Constitution, the one most likely to reflect the original understanding, is the one that produces the clearest rules. As the Supreme Court has explained, the Constitution is designed to provide "[e]xplicit and unambiguous provisions" to govern the structure of government, and most importantly the process whereby a bill becomes a law. INS v. Chadha, 462 U.S. 919, 945 (1983). Our system of government could not function if Article I, section 7, which governs the legislative process itself, consisted of "open-ended" principles without fixed applications. In particular, a bright line rule governing adjournment is necessary to put the President and Congress, as well as those affected by legislation, on notice as to the proper method by which the President may exercise his right to disapprove a bill. The alternative to a clear rule is uncertainty and litigation.

Moreover, to permit return of a vetoed bill to an adjourned Congress would defeat the clear plan of the veto provision, which is designed for prompt reconsideration by Congress and disposition of the issue: the clause says that the recipient house shall enter the President's objections on its journal and proceed to reconsider the matter.

Indeed, the drafting history of the Clause supports this view and is inconsistent with the suggestion that the pocket veto should operate only when Congress has neglected to provide for a return veto in its absence. The Committee of Detail of the

Federal Convention, in composing what became Article I, section 7, at one point prepared a draft providing that if Congress by its adjournment prevented a return veto, the President was to return the bill on the first meeting of the next legislature. But the Committee, in its report to the Convention, replaced that language with the pocket veto proviso essentially as we have it now.

This suggests that the Framers wanted to do more than just make sure that Congress could not defeat the return veto by adjourning. They also wanted to avoid lengthy uncertainty as to whether a bill would become a law. Rather than permit a vetoed bill to lie over until the next meeting of Congress, they provided that it would not become law if the President did not sign it.

Our position accords with the Supreme Court's two decisions concerning this subject. In the Pocket Veto Case, 279 U.S. 655 (1929), the first session of the 69th Congress passed a bill and presented it to the President on June 24, 1926. The two Houses then adjourned that session by concurrent resolution on July 3, less than ten days after the bill had been presented. The President neither signed nor returned the bill. The Court held that it had not become a law because of the Pocket Veto Clause. The Court concluded that Congress had indeed adjourned within the meaning of the Constitution, 279 U.S. at 680-681, and that the availability of an agent or officer of Congress to receive the President's return of the bill was not an adequate substitute for

a House of Congress, to which a veto must be presented according to the Constitution, id. 682-685.

The other case touching on this subject is Wright v. United States, 302 U.S. 583 (1938). That case involved the passage into law of two private relief bills, originating in the Senate, that were passed by both Houses and presented to the President on Friday, April 24, 1936. On Monday, May 4, the Senate took a recess until noon on Thursday, May 7. The President returned the bills with his objections on Tuesday, May 5; the President's messenger delivered the veto to the Secretary of the Senate. When the Senate returned on May 7, the veto message was read and the matter referred to committee, from which it never emerged. The beneficiaries of the legislation claimed that the bills had become law without the President's signature, after the passage of ten days, on the theory that the return veto was ineffective because the Senate was not in session when the veto message arrived.

The Court found that the return veto was effective because Congress, as opposed to the Senate, had not adjourned. 302 U.S. at 587-588. The Court employed the same reasoning we do: an adjournment by one House of less than three days, which does not require the consent of the other House, is not an adjournment of Congress, a bicameral body which acts as such only through both of its Houses. The Court also rejected the suggestion that the return veto was ineffective because the Senators were not actually present in the chamber (even though Congress was not

adjourned) when the President's messenger arrived. Id. at 589-591.[2]

We recognize that our position is inconsistent with two decisions of the United States Court of Appeals for the District of Columbia Circuit. In Kennedy v. Sampson, 511 F.2d 430 (D.C. Cir. 1974), the court held that an adjournment during a session (six days for one house, five days for another) did not prevent the return of a bill and therefore did not present an occasion for the pocket veto. The court therefore found that a bill the President had neither signed nor returned became a law. In Barnes v. Kline, 759 F.2d 21 (1984), vacated as moot sub nom. Burke v. Barnes, 479 U.S. 361 (1987), the court extended the rule of Sampson to adjournments that end a session of Congress, holding that such adjournments do not prevent the return of bills provided that the affected House appoints an officer to receive the President's veto message.

We sought and obtained Supreme Court review of the decision in Barnes v. Kline. The Court agreed with us that the case had become moot, and therefore did not reach the merits. On the merits, we argued, consistent with our position today, that both that case and Sampson were wrong. In an appropriate case, I

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[2] The Court explained that the Pocket Veto Case was not apposite because it dealt with an actual adjournment of Congress, not "a temporary recess . . . taken by one House during the session of Congress." Id. at 593; the Court also declined to read its earlier case as requiring that the return be made when the relevant house was actually "within the walls of its chamber." Id. at 594.

expect that we would ask the full D.C. Circuit to overrule, or the Supreme Court to disapprove, both of those cases.

As I have just explained (and as our briefs in Barnes explain in more detail), our position is fully consistent with both of the Supreme Court cases that address this matter. The same cannot be said for H.R. 849. The bill states that a return veto is prevented only by "an adjournment sine die to end a Congress." The Constitution nowhere distinguishes among adjournments and does not provide for adjournments sine die; such distinctions are created wholly by the rules of the two Houses. Moreover, on this point the bill is inconsistent with the Pocket Veto Case. There, the Court specifically rejected "the argument that the word 'adjournment' as used in the constitutional provision refers only to the final adjournment of the Congress." 279 U.S. at 680. The Court also declined to adopt the suggestion that it would be constitutionally adequate for the President to return a bill to an agent or officer of the relevant House while Congress was adjourned. Id. at 681-685. The Court thus concluded that an adjournment of Congress, by definition, prevents the return of a bill within the meaning of the Pocket Veto Clause.

Let me now turn to the second difficulty with H.R. 849. The discussion we have just gone through deals with questions of constitutional interpretation. The answers to those questions depend on the meaning of the Constitution. Whether a pocket veto is possible in any particular set of circumstances depends on the

meaning of the Constitution. I readily acknowledge that the legislative and executive branches necessarily have differing perspectives on constitutional questions that relate to their respective powers and responsibilities. The difference is particularly to be respected on a question like the scope of the pocket veto which raises difficult issues of constitutional law that inevitably give rise to good faith differences of opinion.

It is precisely respect for this difference in perspective, however, that counsels against any attempt by Congress to enshrine its constitutional view on the pocket veto by enacting it into the United States Code. Given our view on the meaning of the Pocket Veto Clause we would be constrained to recommend that the President veto this bill. Thus, passage of this bill would create a needless point of disagreement between the two political branches.

Moreover, it is unnecessary for Congress to enact legislation to express its views on pure questions of constitutional interpretation. Congress can express such views through one-House or concurrent resolutions, and of course, Members of Congress base their votes on their views of constitutional questions, just as the President must make veto decisions based on his understanding of the fundamental law. But laws of the United States should be used to establish legal rights and obligations, not to express questionable views on interpretive questions.

We defer to Congress concerning the portion of H.R. 849 that would amend the Rules of the House of Representatives.

Again, let me thank the subcommittee for the opportunity to address this question.

Chairman DERRICK. Thank you, Mr. Barr, for your testimony. You have been very thorough.

I agree with you on one thing and that is that there is ambiguity, and of course that is the primary reason that I have introduced this bill and why we are having this hearing, to try to clarify that ambiguity.

Mr. BARR. Mr. Chairman, I didn't say there was ambiguity in this clause; I said the Court will look to history sometimes when there is ambiguity.

Chairman DERRICK. I thought I understood you to say that there was ambiguity as to the situation of a pocket veto as to when it did or did not apply.

Mr. BARR. No, I said the rule proposed by those who would depart from the Supreme Court's precedence would result in ambiguity.

Chairman DERRICK. Then we don't agree on that.

Mr. BARR. OK. That is right.

Chairman DERRICK. The history of this thing, of course if you go back, as I am sure you have done, and read some of the Federalist Papers, one of the things the Framers feared the most, was a king or someone that was going to put himself in some sort of dictatorial position with the legislative body, having experienced just that for a number of years before the revolution, of course.

This was throughout the Convention brought up time and time and time again. As a matter of fact, it was brought up in arguments on the veto. What they wanted to get around was to have a President—they voted on this. They could have had absolute veto over the Houses of Congress, of course, but there is no ambiguity there as to what was intended by the Framers of the Constitution.

I think that they had no intention of giving a President what amounts to an absolute veto over the Congress to the extent that the pocket veto has been misused over the years.

In any event, it seems to me that if you look at what the Framers of the Constitution most feared and if you apply that to the modern-day situation, it seems to me that this bill is very much in order.

As far as the Congress, as the Supreme Court noted in *United States* v. *Nixon,* the Judiciary expects each branch of government in performance of its duties initially to interpret the Constitution.

Having said that, I would like to know why the administration opposes this bill. It is clear in the debates at the Constitutional Convention that the Framers deliberately avoided giving the President an absolute veto. Why is the administration now opposing this?

Mr. BARR. Because we think the bill is unconstitutional.

Chairman DERRICK. That is the only reason, just that you think it is unconstitutional?

Mr. BARR. Well, that is a good reason to oppose——

Chairman DERRICK. I know it is a good reason, but I would hope there would be more than that.

Mr. WHEAT. Would the chairman be kind enough to yield?

Chairman DERRICK. Yes.

Mr. WHEAT. I don't think unconstitutionality is a good reason in this administration. The President has clearly stated that there are

some bills, even if they were unconstitutional, that he would sign. That can't possibly be the only reason.

Mr. BARR. What did he say that about?

Mr. WHEAT. I think it was something to do with the flag.

Mr. BARR. I was the one who testified on the flag and I don't believe that that was said.

Mr. WHEAT. Were all of the news reports across the country regarding the President's statement incorrect?

Mr. BARR. I have read everything the President has said about the flag and he has never said that he would sign a statute if he believed it was unconstitutional.

Mr. WHEAT. That is a—I would yield back and talk about it more in a few minutes.

Chairman DERRICK. Let me ask you——

Mr. BARR. Can I give a broader answer to your question?

Chairman DERRICK. To my question or——

Mr. BARR. To your question.

Chairman DERRICK. Go ahead.

Mr. BARR. I think it is oversimplistic to say that the Constitutional Convention was animated principally by a suspicion of Executive power. In fact, I think it would be fairer to say that one of the miracles of the Constitutional Convention was the creation of a strong, independent Executive.

I think that, as a matter of fact, while going into the Revolutionary War, there was a tremendous amount of concern about Executive power and so forth. The experience of the revolution and the Confederation convinced the Framers that it was very important to have a strong, independent Executive.

Chairman DERRICK. Up to a point.

Mr. BARR. Up to a point, and that is why article II is in the Constitution. Really, it is one of the great stories of how political experience can frame the Constitution.

Now, it is true that there was debate over whether or not there should be an absolute veto, which a faction favored, or whether it should be a qualified veto.

This is not an issue as to whether there should or should not be an absolute veto. The Supreme Court said that in the *Pocket Veto* case. They rejected this argument, and said the argument is based on misconception of the pocket veto clause.

Congress has the power to protect itself from the pocket veto by giving the President sufficient amount of time to make his objections and to have them rapidly considered by the Legislature. The President, after all, is given 10 days to review whatever comes out of Congress at the end of a session or before a recess, 10 days at whatever comes out of Congress at any time.

What the Framers wanted was for Congress to give the President the opportunity to review it and then the opportunity to have those objections considered quickly and on their merits.

At the same time, the Framers did not want to require Congress to sit in session or to have Presidential leave, and that is why Presidential approval is not required for Congress to go on adjournment, but Congress does pay a price in a sense if it does adjourn after throwing bills into the President's lap. That is the price, the

potential of a pocket veto. But it is something the Congress has the power to prevent.

Chairman DERRICK. If that is true, why do you think that the Court opted not to rule on this matter or not to reach a decision on this matter in the *Barnes* case, if not in several other cases that have come up since then, and why would your Solicitor General then, Mr. Bork, in his memorandum in 1976, advise not carrying the matter further because he felt the Supreme Court would probably rule contrary to your position?

You know, he gives some very strong arguments and I am sure you are familiar with them.

As a result of that, the administration did not carry it forward.

Mr. BARR. The first part of your question is, why do I think the Court did not decide the issue. I think the Court did not decide the issue because there was a jurisdictional issue which was whether it was moot. If the Court determined that it didn't have jurisdiction, it didn't have to go on and decide the merits.

Normally, the Court will normally determine jurisdiction before it decides on the merits.

Chairman DERRICK. I understand.

Mr. BARR. As to Judge Bork's position, he did take the ducking the Congress position, I feel, and I think he was wrong. In other words, he presumed that the sole intent of the Framers was to make sure that there was a mailbox somewhere so the President didn't get stuck. I don't think he can presume that. I think he is wrong in doing it.

Chairman DERRICK. You don't think it is possible the Court deferred to the Congress and the President to work this thing out, because they recognized that the answer lay possibly in some legislation such as that that we are looking at today?

Mr. BARR. In the two earlier pocket veto cases, the Court hastened to jump into the fray and say they were doing so because they considered it a very important issue to resolve because of the need for clear rules of the game as to how laws are made.

Now, I think it may be the Court did not want to reach a separation of powers question particularly in a case that they felt jurisdiction was questionable.

But no amount of practice and accommodation can override constitutional requirements. You can defer a confrontation or a difference of opinion, but the Constitution says what it says and means what it means.

Chairman DERRICK. In other words, you don't think that was the reasoning behind the Court's failing to reach a decision in this case?

Mr. BARR. No, I don't.

Chairman DERRICK. Thank you.

Mrs. Martin.

Mrs. MARTIN. Just so I understand, I think I understand your position. Your position is that a statute is inappropriate because it would be unconstitutional. So you oppose it.

Therefore, if we wanted to make changes, it should be an amendment, which you would also oppose?

Mr. BARR. Well, I would have to see the amendment before we——

Mrs. MARTIN. Well, the amendment in effect changed the Constitution in ways the statute did. You would oppose that, too, right?

Mr. BARR. I haven't even considered that issue.

Mrs. MARTIN. Well, you start off your reasoning by saying that one of the reasons you can't do it or you shouldn't do it, the House shouldn't do it, is because such a statute would be unconstitutional.

Mr. BARR. Yes.

Mrs. MARTIN. Therefore, you say—let me see if I can find the line here.

I am just saying, it is an interesting box in effect you would try to put us in, which is that you can't do it by statute because I would oppose it because it is a statute; you can do it by constitutional amendment perhaps, but I will oppose that, too.

Mr. BARR. No, there are two ways to resolve it, but just remember the Supreme Court decided a case involving an intersession recess and it said that you can not leave an agent in place during intersession and the President can use the pocket veto regardless of whether there is an agent there.

That case has been decided by the Supreme Court. That case is still good law. To come along with a bill and try to overrule that case is clearly unconstitutional.

Now, there are those who say modern conditions, you know, we can sort of finesse this and talk about modern conditions and communications, and the real concern there was this rather than this. Fine. One way to resolve it is through litigation. If the President pocket vetoes a bill and some feels it was an illegitimate pocket veto because an agent was there to receive it, some beneficiary of this bill, and this is how the others came up, they can sue and say that is the law.

Mrs. MARTIN. There is a second way to start the litigation process, and that is that we pass a bill and someone says, "I don't approve of the bill," it is unconstitutional and starts the process that way.

You are saying from the start anyway—and you may well be right, I don't know—you say it is not the Congress' role to impose or to decide constitutionality.

Mr. BARR. That is where we agree.

Mrs. MARTIN. That is the Court's role.

Mr. BARR. Absolutely.

Mrs. MARTIN. So to argue we shouldn't pass something because you believe it might be unconstitutional, that is an interesting opinion and certainly one should value them, and I am not in any way suggesting you don't, and certainly we should look at that.

I will say the only time I have heard that argument is from people who oppose a certain bill. That is the only time I hear constitutional arguments. But it really isn't our judgment about constitutionality that counts.

Mr. BARR. There are a couple——

Mrs. MARTIN. Or yours.

Mr. BARR. There are a couple reactions to that. It takes two to make a bill a law. Congress wants to pass a law. We are up here telling you our position because the President also is a player in the legislative process.

Mrs. MARTIN. Right.

Mr. BARR. We believe the bill is unconstitutional. It is not the way to go.

This case could be brought to a head without a bill. In other words, by your own internal rules, you can appoint an agent. The President pocket vetoes something and a case can be brought.

You said it is not the role of Congress to impose its view, constitutional, on the law. I agree. That is why we say the bill is peculiar. It is presenting to the President, saying sign on to our theory. You can have your theory tested without legislation.

The Department of Justice will not recommend the President sign that bill because we believe it is unconstitutional.

Mrs. MARTIN. So the House and the Senate could pass this, if it turns out this is the will of the House and Senate, and we are certainly at early stages on this. And you would be in effect saying, if you pass it, your recommendation to the President will be to veto it for a number of reasons, including the fact that you believe it is unconstitutional and impinges on his rights.

So the way to have it done is the House and Senate would have to get it to that point and we would have to override the veto—unless he pocket vetoes it.

Mr. BARR. We might recommend a pocket veto, yes.

Mrs. MARTIN. What a wonderful way to end it. We could do a bill and the court case all in one.

Mr. BARR. That is right.

Mrs. MARTIN. What an efficient use of the law.

Chairman DERRICK. I am glad to see he just adopted the doctrine of congressional standing just a moment ago.

Mr. BARR. I said a beneficiary of the statute. I said a beneficiary of the statute can bring suit.

The other point you made I don't agree with, and that is that Members of Congress sort of—it is up to the courts to decide constitutionality. We sort of have to do what we are going to do.

Mrs. MARTIN. Yes, ultimately.

Mr. BARR. I agree with what Chairman Derrick said, that each branch in the first instance has a responsibility under their oath of office to use their best judgments to what the Constitution means and do their best to uphold the Constitution, so I believe Members of Congress as well as the President and members of the executive have a real responsibility to the Constitution to reach good-faith judgments.

Mrs. MARTIN. But I am not suggesting we ignore that. I am suggesting our interpretation is, it is constitutional, and yours is not. We could do a poised action, frozen in time to the end of time without the final decision. That is, the other branch we finally have to have work its will.

No one is suggesting we go around deliberately passing unconstitutional laws.

Mr. BARR. The two pocket veto cases have been decided by the Supreme Court—a doable thing. I am saying that we could not support this bill because we believe it is unconstitutional.

Chairman DERRICK. They didn't declare that this legislation, or something similar, would be unconstitutional.

Mr. BARR. I think they did in the *Pocket Veto* case.

Chairman DERRICK. What I meant to say is, they didn't say we didn't have a right to pass the legislation and that that right would be unconstitutional.

Mr. BARR. Well, I guess it is presumed that people—a branch will not knowingly do an unconstitutional thing. But if it is the good-faith judgment of Congress that it is not unconstitutional, no one is questioning the power of Congress to pass a law.

Chairman DERRICK. Mr. Wheat, I will let you question.

Mr. WHEAT. Thank you.

I agree with you completely when you say that it is not the appropriate role of Congress to attempt to change the Constitution by legislation. I think all of us would agree with that. But I think you went further in pointing out there is a matter of some interpretation as to what the Constitution actually means.

I was interested in the historical process that you were speaking of and of how the Constitution clearly meant that pocket vetoes were appropriate in intersession adjournments and perhaps even in intrasession adjournments.

I take it you extend your reasoning to intrasession adjournments even though there were no particular cases on that point?

Mr. BARR. Intrasession?

Mr. WHEAT. Intrasessions, yes.

Mr. BARR. Yes.

Mr. WHEAT. In particular, you refer to adjournment meaning adjournment and that adjournment is well defined and that there is no room for doubt on its meaning. You then went on to talk about adjournments of various lengths being used in the Constitution for an assortment of purposes. That seems to be one of the cruxes of the problem that we face.

What this legislation is is an attempt to define specifically what kind of adjournment and how long an adjournment the Constitution originally referred to in talking about pocket vetoes.

How can the length of time for adjournment be ambiguous or at least varied for different purposes, and yet seem so clear to you for pocket veto? In light of the opposite view taken by the Court in 1929, further elaboration on your point of view is necessary.

Mr. BARR. The word adjournment, referring to the adjournment of a House or Congress, can be any length of adjournment. We think there is a clear rule in the Constitution as to when Congress is deemed to be adjourned as a bicameral entity.

As I said, a House can adjourn for a day. The Constitution says that when one House wants to go out for more than 3 days, it needs the consent of the other House. There you have two Houses acting, and under *Chadha,* we believe that reflects action by Congress to adjourn itself. So you no longer have a bicameral body sitting there acting as a collective capacity as the Congress of the United States.

So it is a very clear rule. If one House goes out for more than 3 days, you have an adjournment of Congress.

Mr. WHEAT. The Chairman suggested there was ambiguity involved. Considering the fact that since 1929, the Court has found that adjournments of longer than 3 days are not adjournments for the purpose of a pocket veto, would it not seem to you that there is some need for clarification on this matter?

Mr. BARR. One case that is an extant case decided that adjournment of longer than 3 days was not an adjournment within the meaning of the pocket veto clause and the President could not use the pocket veto. That was the *Kennedy* case.

Mr. WHEAT. Yes.

Mr. BARR. We think the *Kennedy* case was wrong, and in future litigation, if the appropriate case arises, we will urge the Supreme Court to follow the *Pocket Veto* case and *Wright* case, and overrule that case, reverse it.

Mr. WHEAT. Does the administration believe that the balance of powers between the President and the Congress would be shifted in such a way as to be harmful to either the President or to this legislative body if the interpretation of the pocket veto that we propose in this bill becomes law and is determined to be constitutional?

Mr. BARR. Well, it is hard for me to say whether this individual piece of legislation would ever work a shift, standing alone. That is hard to predict.

But I think separation of powers as a principle means that we always have to be on our guard against eroding or undermining constitutionally based powers of any branch of government because either by themselves or collectively, it can work a shift in the balance of power among the branches.

Therefore, on separate of powers questions, I believe we have to be faithful to the letter of the Constitution.

Mr. WHEAT. I understand your caution about this legislation but I don't hear you saying specifically why you find it onerous or harmful other than the argument that you make against its constitutionality.

Is it your belief that it will harm the balance between the Presidency and the legislative branch of Government?

Mr. BARR. As I say, I think the bill is fundamentally flawed because it is unconstitutional. Going beyond that question to policy questions, I think the more you permit delay in considering a veto, the more you are departing from the intent of the Framers and the more, as a policy matter, that it is objectionable.

Mr. WHEAT. The world is different today than when the Constitution was framed or even since 1929. Congress can be called together much quicker and it can consider a bill basically on a contemporaneous way to the veto even though it is not actually sitting at that moment. Are you saying that you accept none of the practicality arguments put before the committee today?

Mr. BARR. No, I don't accept that. In fact, I think the Constitutional Convention history shows——

Mr. WHEAT. That is the whole argument you make about the Congress not being in session and having adjourned. You state that the Congress can't consider a bill near the time that the President vetoes it. If in fact Congress can do so, then why shouldn't that be taken into account?

Mr. BARR. I am not making any argument that modern circumstances dictate a change. On the contrary, I am saying that modern circumstances do not warrant a change.

The Framers originally started with a draft document that did leave the decision up to Congress on when to take up a veto. Remember, the original draft said that the President would hold on to

his veto until Congress came back. That is a practical equivalent of what is being proposed here, just put that in the hands of Congress, and it will be, well, this is important enough. We better get back to Washington, DC, and take a look at this. Or say, this isn't really important, I am going to continue hobnobbing with my constituents and we will take this up in due course when we return.

The Constitutional Convention rejected that and said that if Congress isn't there to deal with the President's messages, go to the pocket veto. Congress can always be there for 10 days and stay there for 10 days to make sure they complete the legislative process, but if Congress absents itself from the legislative process, the price it pays is the pocket veto. That was the call made by the Framers.

Mr. WHEAT. Thank you, Mr. Chairman.

Chairman DERRICK. Mr. Gordon.

Mr. GORDON. Is it fair for me to assume that your line of logic is that based on the stare decisis, that you have the responsibility, because these prior Supreme Court decisions would indicate to you that this legislation is unconstitutional, to oppose it as the responsibilities of your branch of government dictate; is that correct?

Mr. BARR. Yes.

Mr. GORDON. Then if that is correct, it would seem in the case of *Roe* v. *Wade* that the Court has made a pretty clear determination of what the Constitution is there.

Why are you trying to overturn that decision? Why don't you follow the same stare decisis logic?

Mr. BARR. We believe the decision in *Roe* v. *Wade* was clearly wrong and unconstitutional.

Mr. GORDON. So you are not leaving it up to the Supreme Court. There you are smarter than the Supreme Court, but in this case, the Supreme Court is the smartest?

Mr. BARR. Is what?

Mr. GORDON. Well, I am trying to distinguish why the Supreme Court understands the Constitution in one case but not in another. It seems that you are saying that you have a higher understanding and that when you think the Supreme Court is right, then it is right; but when you think it is wrong, then you should take another course.

Mr. BARR. Obviously we think the Supreme Court decisions in the *Pocket Veto* case and the *Wright* case were correct interpretations of the constitutional provisions as adopted.

If people don't like the inefficiency of what the Framers did, they can go about changing it. But we think it was a correct interpretation, and it is.

Mr. GORDON. You think the Supreme Court was wrong in *Roe* v. *Wade*?

Mr. BARR. Yes.

Mr. GORDON. But I thought you said your logic was that because of stare decisis, because you are trying to follow the precedent of the Court, that you had a responsibility in this case to oppose the legislation.

Mr. BARR. That is right, because we——

Mr. GORDON. Because of precedent.

Mr. BARR. Obviously, not solely because of precedent.

Mr. GORDON. That is what you said earlier, because of precedent. If that is the case——

Mr. BARR. I didn't say it was solely because of precedent. Obviously both branches can seek to have a law changed if it believes the law is a bad law. It can do it either through constitutional amendment and several Presidents have proposed constitutional amendments to undo *Roe* v. *Wade,* or it can do it through a litigation strategy if it wants to change the Supreme Court's position on the meaning of the Constitution.

That is exactly the strategy which I assume Congress should follow here if it believes that the *Pocket Veto* case and the *Wright* case are incorrect.

Mr. GORDON. I guess I misunderstood you. I thought you had said that because the Supreme Court had spoken clearly on this matter that you had a responsibility to uphold that position. Is that not correct?

Mr. BARR. Partially, that is correct. Partially.

Mr. GORDON. I am just looking for some consistency because I thought the Supreme Court had spoken clearly in *Roe* v. *Wade.* Apparently their clear statement was not satisfactory.

Mr. BARR. I will repeat it again, which is we believe the Supreme Court's decision in the *Pocket Veto* case and the *Wright* case were correct decisions in interpreting the Constitution as it was adopted by the Framers. We do not think *Roe* v. *Wade* was.

Therefore, through litigation and by asking the Court respectfully to reconsider its position, we will continue to work, as the President said, for——

Mr. GORDON. The basis of your argument, then, really is not precedent or stare decisis but rather what you think the Supreme Court should be doing.

Mr. BARR. I said from the beginning that each branch has the responsibility to use its good-faith judgment in the first instance, and this has been said repeatedly by Members of Congress and by the President, as to what the Constitution means.

Mr. GORDON. So if that is the case, and if Congress wants to use its good-faith judgment and try to come forth with this process to have the Supreme Court make a decision, then why are you trying to block that good-faith effort?

Mr. BARR. As I pointed out to Congresswoman Martin, Congress can advance its position without asking the President to join on something that the Department of Justice doesn't agree with at least.

The Department of Justice will recommend disapproval of a bill because the bill has to be presented to the President and signed by the President before it becomes the law of the land. The House, through its own rules, can test its theory of pocket veto.

What is happening here is an attempt to shove Congress' theory of the pocket veto down the throat of the Executive.

Mr. GORDON. It is not trying to shove it down the throat of the Executive but rather to try to raise it as an issue with the Supreme Court and allow the Supreme Court to make a decision.

Mr. BARR. Well, I will repeat: You don't have to pass a bill to raise it as an issue with the Supreme Court.

Mr. GORDON. But isn't this a valid approach?

Mr. BARR. I don't know what you mean by valid approach. I believe the bill is unconstitutional, so I don't think it is a valid approach.

Mr. GORDON. I guess we go back to Mrs. Martin's question of who makes that decision. Apparently you decided that you wanted to make the decision and you were the one; and you trust the Supreme Court sometimes and you don't other times.

Mr. BARR. Well, I am not sure what the question is.

Mr. GORDON. But you know what the answer is.

I yield back my time.

Chairman DERRICK. Mr. Pashayan.

Mr. PASHAYAN. Well, I guess just coming in late and not having heard what preceded, it strikes me first of all—and I am treading a little bit on dangerous ground when I say this—but it strikes me first of all that in the case of *Roe* v. *Wade* and the allied decisions and then the recent case, you are talking about the Bill of Rights and you are talking about really inferential law from the text of the Bill of Rights; whereas here you are dealing with the more literal text of the Constitution itself.

We don't need to infer words that are actually in article I, section 7 when it says unless the Congress, by their adjournment, prevents return, in which case it shall not be a law. That is the literal statement of the Constitution.

Mr. GORDON. Would the gentleman yield?

Mr. PASHAYAN. Let me finish.

Mr. GORDON. Sure. Go ahead.

Mr. PASHAYAN. And one could also certainly address your concern about the Supreme Court making its position by asking the same question you asked in the case of the *School Board* v. *Brown, Brown* v. *the Board of Education,* which was a reversal of an earlier case.

So I am not so sure in examining this subject what good it does us to engage in a lengthy discussion about whether or not we are putting our faith in the Supreme Court or not.

It just seems to me that what we have to do is to go back and see first of all what the text literally says.

And, second, let me put this in the form of a question, and it may have been addressed by you all before I got here, but has there been any research on the part of you or your people in the records of the Federal Convention in terms of what the Founding Fathers say at the Federal Convention when they wrote this phrase, and what was it intended to mean? Has there been any research done on that?

Mr. BARR. Yes, Congressman. There is very little on the clause itself but the history that is there, in our view, supports—surprisingly—the Department of Justice's position.

The first provision that was presented in draft to the Committee on Detail had very much the same language, but it had a proviso on the end that said, "Unless the Legislature, by their adjournment, prevents return, in which case it shall be returned on the first day of the next meeting of the Legislature."

So the original proposal was that the President—if Congress was out—the President would hold on to his veto message and when Congress came back, he could give it to Congress. That was

changed by the Committee on Detail and instead, in our view, they went to an absolute rule. They took it out of the hands of—they didn't want long periods of delay and they didn't want Congress to make the decision necessarily as to whether or not it was important to give immediate consideration to a veto message. So they went with an absolute cutoff.

Mr. PASHAYAN. OK.

Mr. BARR. That is the historical evidence.

Mr. PASHAYAN. Has there been any research done on the debates in the various State legislatures when they were debating ratifying the Constitution?

Mr. BARR. I believe it has been done and I believe there is no enlightenment that we can derive from those discussions.

Mr. PASHAYAN. That was not a point that any of the State legislatures debated when they came to ratify the Constitution?

Mr. BARR. Yes, I believe that is correct.

Mr. PASHAYAN. I am a little surprised to hear that.

I will yield.

Mr. GORDON. It is not for us to make the decision, but I was surprised on one point. Is it your feeling that there is a superior position of the so-called original text of the Constitution?

Mr. PASHAYAN. That is why I said it was dangerous to get into this. It seems to be pretty precise in this case. It is not a matter of—the only phrase you can interpret here, it seems to me, and that is what we are here to talk about, is what does adjournment mean.

Otherwise, this is a pretty precise rule of procedure rather than an exposition of some kind of right, which of course needs to be, as the Supreme Court has done in its entire history, a broad, general concept filled in with hundreds of interpretations as to what it means.

Mr. GORDON. The point you raise to some extent was very well taken by Mrs. Martin earlier. I think the situation now is bright and knowledgeable people have legitimate differences on this matter, and that would seem to be the Supreme Court; rather than for us to speculate what the Supreme Court should and shouldn't do and what they might or might not do, simply let them do it.

Mr. PASHAYAN. I think——

Mr. GORDON. I would be glad to yield back.

Mr. PASHAYAN. I imagine if forced to, they would make a decision on this.

Mr. GORDON. Or if allowed to.

Mr. PASHAYAN. What is the way to get it to the Supreme Court without the bill that is the subject of this hearing?

Mr. BARR. The way the other cases came up, there would be a pocket veto and then a beneficiary of the bill would say that the bill had actually become law and therefore he was entitled to whatever rights he had under the so-called law, and the Court would have to determine whether there had been an effective pocket veto or whether it had become law.

Mr. PASHAYAN. There are cases on that point?

Mr. BARR. Yes, that is how the pocket——

Mr. GORDON. Is there a statute of limitations on that?

Mr. BARR. I doubt there is a statute of limitations on that.

Mr. PASHAYAN. There have been cases in the Supreme Court on that point?

Mr. BARR. Yes. The first case came up that way, the *Pocket Veto* case.

Mr. PASHAYAN. I was just wondering.

Chairman DERRICK. Of course, the Congress now has standing in the D.C. Circuit.

Mr. PASHAYAN. I understand that.

What did the Court find on that?

Mr. BARR. It found that—that is a decision that this bill would directly attempt to reverse. There, there was a pocket veto during an intersession between sessions, not between Congresses.

Mr. PASHAYAN. This is part of the cobwebs on this.

Mr. BARR. The argument was raised by the participating congressional interests that this could be handled by leaving an agent in place to receive a veto message. The Court said, "Look, the adjournment does not mean final pocket veto; adjournment covers intersession adjournment." Therefore, on the plain text, adjournment applies.

Second, you can't get around a pocket veto by leaving an agent there to accept it. One of the main purposes is to have Congress there at hand to quickly consider the President's objectives, and if they are not there at hand, they pay the price of a pocket veto.

Mr. PASHAYAN. How would the author of the bill get around the concept if he were to leave an agent there to receive the veto? How would you get around the rule of requiring a quorum be present?

Chairman DERRICK. The agent receives it and then the Congress considers it.

Mr. PASHAYAN. But the Congress isn't the Congress until there is a quorum.

Chairman DERRICK. The Congress will have a quorum when it gets back.

Mr. GORDON. Unless it is challenged.

Mr. PASHAYAN. I think the other problem you face is it tends to say the Congress has to be there during those 10 days.

I think another issue is going to have to be, can a Congress receive it if there is not a quorum there?

Chairman DERRICK. The Congress will appoint its agent to receive this and address it when it gets back.

Mr. PASHAYAN. And if somebody objects—the agent under the Constitution cannot supersede the text of the Constitution, which requires a quorum to be present.

Chairman DERRICK. Let's work the reverse. The President has his agent when he is out of the country. If it is constitutional for his agent to receive this legislation, then why is not the reverse true for the Congress?

Mr. PASHAYAN. Because I don't think there is a requirement in the case of the President for a quorum.

Chairman DERRICK. If the President is not there, there is not a quorum there.

Mr. PASHAYAN. If there is an agent here, somebody could object that there is a lack of a quorum.

Mr. GORDON. They would have to do that. The quorum is presumed unless——

Mr. WHEAT. The agent of the Congress is appointed by the Congress while the Congress is in session. It is an action of the Congress to appoint an agent to act on its behalf including receiving its messages.

Mr. PASHAYAN. But the Constitution says the Congress has to be there. That is my whole point.

What you are saying is that a statute will come along and say that rather than the text of the Constitution requiring the Congress to be present, we are going to substitute an agent. That would still be subject to a quorum call, and I don't think you can get around that because the Constitution requires a quorum be present.

Mr. WHEAT. I think you are about to throw out 100 years' worth of——

Mr. BARR. I think you are correct. The Constitution vests Executive power in the individual President, Office of the President, one person. Congress is a bicameral body. It has to act collectively. You need the operation of both Houses together before you can give any effect on the legal rights and duties of anyone outside the House and Senate acting collectively.

Chairman DERRICK. You know, if I may say this, my position is that the Congress is not truly adjourned except one time; that is the end of 2 years when they adjourn the final session sine die, because that Congress never comes back. The next Congress convenes.

You know, Mr. Barr has repeatedly talked about delay of legislation. Well, by using the pocket veto as it has been used over the years by Presidents and was used by President Reagan extensively, the result is delaying legislation.

You and I both know that the Congress is in session almost year round now and that the fact of the matter is that by using the pocket veto, you do what the Founding Fathers never really intended to happen, and that is to give the President, in a large number of cases, an absolute veto over the Congress.

The Congress sits almost year round. If they want to appoint an agent while they go home to their districts for a period of time, that is not going to delay the consideration of the legislation. I don't think that that is what the Founding Fathers or anyone else really intended to happen.

As you pointed out, it is a matter of how you interpret the word "adjournment."

Mr. PASHAYAN. I am also suggesting that in addition, it points out the definition of Congress and can an agent ever be the Congress not subject to a quorum call.

Chairman DERRICK. The Congress has a right to appoint an agent to receive vetoed bills until it has an opportunity to reconsider them.

Mr. PASHAYAN. If what you are suggesting is that when the Congress, for example, in August is not adjourned, according to the use of this word here, which is what you are suggesting——

Chairman DERRICK. That is exactly what I am suggesting.

Mr. PASHAYAN. Then I would suggest that at any time in August, it is subject to a quorum call. The Congress cannot both be in session and not be in session without being——

Chairman DERRICK. We are not talking about being in session; we are talking about "adjournment."

Mr. PASHAYAN. You are talking about being in session. What you are suggesting is that in August—and I just use this as an example—I think what you suggest logically, I think you are bound by the suggestion that in August, the Congress will not be adjourned according to this word.

Chairman DERRICK. That is correct.

Mr. PASHAYAN. Therefore, the Congress must be in session.

Chairman DERRICK. In session for the purposes of receiving——

Mr. PASHAYAN. If the Congress is in session, it is always going to be subject to a quorum call.

Mr. WHEAT. If the gentleman would yield, I think you are carrying the argument past the point of sublime. What you are suggesting is that any time that we are not adjourned sine die, that we are subject to a quorum call, and that is patently untrue. We don't have quorum calls when we adjourn on a daily basis.

Mr. PASHAYAN. Just a minute, sir. Just a second. Maybe I am being a little bit simplistic here, but I really don't think I am.

Mr. WHEAT. I wouldn't insist upon that word unless you would like me to.

Mr. PASHAYAN. I do insist on it. I am a very simple creature.

Either the Congress is in session or it is adjourned. Are you suggesting a third state of being?

Mr. WHEAT. I am asking you if you think we are subject to a quorum call. Were we subject to a quorum call last night at 2 o'clock in the morning?

Mr. PASHAYAN. Not when we are adjourned.

Mr. WHEAT. Are you then suggesting that last night's adjournment is the same kind of adjournment that adjournment sine die is?

Mr. PASHAYAN. Adjourned in the Constitution. It says "adjournment." Either we are in or out of the status of adjournment in terms of article I.

You are suggesting a twilight zone.

Mr. WHEAT. I would suggest that there are two types of adjournment and that they are distinct and separate. That is one of the reasons for this legislation, to make a determination as to what kind of adjournment would allow a pocket veto.

Mr. PASHAYAN. It seems to me that this is one word, "adjournment." I am holding it upside down. No wonder I can't read it.

Mr. GORDON. If the gentleman will yield, I assume the Constitution also speaks to residency. "Residency" is one word, but there are different categories of residency. "Residency" is defined one way for registration, defined another way for tax reasons. Residency although is used, the word is used once there. There are different definitions of residency for different purposes.

But it really—again, we can have this esoteric argument and it would be very bright and lofty, but it has absolutely no effect until the folks across the street make that final determination. I think that is the argument Mrs. Martin made very articulately, is that they should have that opportunity.

Mr. BARR. If I can leap forward for a second. The word adjournment is right there in black and white. It is used throughout the Constitution.

Mr. Chairman, you said, well, we are not really going into adjournment in the true essence of the word. What is important is what the Framers meant by the word adjournment, not what we now believe the true sense of the word is today.

Mr. WHEAT. If you would hold that thought for just a moment.

Mr. BARR. Can I finish the thought is——

Mr. WHEAT. Previously, you state that adjournment does not mean adjournment. Are you now saying that adjournment refers to adjournment only for 3 days or more, when both Houses of Congress have acted.

Mr. BARR. No. Adjournment means, as the Supreme Court said, specifically said, adjournment is not just limited to final adjournment at the end of Congress. Adjournment means adjournment, and it includes intersession adjournment. That is in black and white in the Supreme Court decision.

Mr. PASHAYAN. What was the vote on that case?

Mr. BARR. Nine-zip.

Mr. GORDON. What fear is there? Why not let the Court do it again?

Mr. BARR. We are not afraid.

Mr. GORDON. Then let it go.

Mr. PASHAYAN. Well, we invited this man to come here. Let's not browbeat him.

Mr. GORDON. You are saying it is only his opinion.

Mr. PASHAYAN. Of course it is.

Mr. GORDON. And I guess the assumption is the Supreme Court is the final determiner.

Mr. PASHAYAN. I think that is right. The Supreme Court is.

Mr. GORDON. Then let's let it work its will.

Mr. BARR. The issue is, what is adjournment of Congress within the meaning of that clause. There we believe the 3-day rule is set out in black and white in the Constitution. The line was drawn by the Framers.

One approach is there is no logical stop along the way. You could go along indefinitely or for very long periods of time.

The Framers made the call that 3 days was a reasonable rule of thumb, and Congress would be deemed to be in session even if one House had adjourned for less than 3 days.

Mr. PASHAYAN. I have a strategy here for you to work on and it will require the cooperation of the President. We will have the Congress pass a pay raise bill for Members of Congress, and for the Judiciary system, we will have the President pocket veto, and I will bet you 10 to 1 the Supreme Court will overrule the pocket veto on that one.

Chairman DERRICK. Mr. Barr, I think it is on page 5 of your testimony, you speak of a "bright line" of 3 days. What makes you think that your bright line is any better than our bright line?

Mr. BARR. What is your bright line?

Chairman DERRICK. Our bright line is the legislation which means final adjournment sine die. You say it is necessary to have

that bright line so that the Congress and the President will not be confused, but what makes your bright line superior to ours?

Mr. BARR. Well, because——

Chairman DERRICK. Where in the Constitution—go ahead.

Mr. BARR. What is the principle you are using that the President is prevented somehow from making a return or is not prevented because of the physical presence of the Clerk in Washington, DC? Suppose the Clerk isn't in Washington, DC, on the 10th day? Is the President prevented from making a return?

Chairman DERRICK. When the Congress has a properly appointed agent to receive——

Mr. BARR. Excuse me.

Chairman DERRICK. When the Congress has a properly appointed agent to receive veto messages.

Mr. BARR. So we have a question of a legal nature as to whether that person was available, whether authorized or whether another obstruction prevented the President.

Chairman DERRICK. That is not my question. Why is your bright line better than our bright line?

Mr. BARR. I thought I just answered it.

Chairman DERRICK. Maybe it skipped over me. Try it again.

Mr. BARR. Your approach injects into the question the question of when something becomes a law, a lot of ancillary legal questions. Suppose your agent isn't around or is dead or not in the country on the 10th day?

Chairman DERRICK. No, that is not my question.

Mr. BARR. We have a big legal argument as to whether something is law or not.

Chairman DERRICK. What we do is we legally define it under the statute so everyone knows where they are and what to expect.

Mr. BARR. The——

Chairman DERRICK. The Congress, I would suppose if the Congress didn't have a duly appointed agent, that the Congress was adjourned.

Mr. BARR. The problem with your approach is that, as I said at the beginning, the whole rationale for it is that the only reason behind the pocket veto clause is to make sure there is a mailbox somewhere that the President can go to.

Your position essentially is as long as we provided that repository, we can go and do what we want and we can call whatever adjournment is an adjournment.

Chairman DERRICK. No, not whatever an adjournment is. We very definitely define what adjournment is. It is when we adjourn sine die at the end of the Congress.

Mr. BARR. What you are saying is, as long as you are providing that safe repository where the President knows he will always be able to get his message in there and on the public record and subject to consideration, which is what the constitutional requirements are, that as long as you provided that, you can define what the word adjournment means.

Chairman DERRICK. Any time he knocks on the door, it shall be opened.

Mr. BARR. And what that injects into the pocket veto clause is questions as to whether or not—what you are really doing is reading out the word adjournment.

Chairman DERRICK. But what you are saying is that—if your argument applies to me, why doesn't it apply to your 3-day bright line? Why not make it 1 hour? Why not make it overnight?

Mr. BARR. Because the Constitution says 3 days. That is it. The call has been made.

Chairman DERRICK. There is no connection between the 3-day rule and adjournment that prevents return of the bill. Is it written in the Constitution that 3 days shall be the period constituting an adjournment?

Mr. BARR. The *Wright* case, the Supreme Court case in *Wright*, goes right to that provision on the adjournment, 3-day rule, and brings it into the pocket veto concept, and said there was no adjournment of Congress because the adjournment was less than 3 days. So this is not a link that the Department of Justice is making. This is a link the Supreme Court has already made.

Mr. PASHAYAN. Will the gentleman yield?

Chairman DERRICK. I will be glad to yield.

Mr. PASHAYAN. I think the problem is, you just can't focus in on the adjournment clause. I think you also have to focus in on whether the Congress is in session. Let me ask you this question.

If the Congress is not adjourned, is it therefore in session?

Chairman DERRICK. For purposes of a pocket veto, yes.

Mr. PASHAYAN. But if it is in session, it must be subject to a quorum call.

That is the part that I don't think you can get around. I don't think you can have the Congress in session not subject to a quorum call.

Chairman DERRICK. What are we going to do, call a quorum at 2 o'clock in the morning? There is a difference between when it is actually sitting and when it is in session.

Mr. PASHAYAN. What I am saying is, I think even if you were to pass this bill, and you had the agent, the Speaker or whoever it is going to be, that at any time—what you are really saying is that the Congress is in session as long as that agent is.

Chairman DERRICK. It is in session at 2 o'clock in the night, then, 2 a.m. in the morning.

Mr. PASHAYAN. I suppose it is, but it is not in session for the purposes of doing business.

Chairman DERRICK. It is not sitting for purposes of a quorum.

Mr. PASHAYAN. What I am trying to say is, if you have an agent there, I think what you are saying is that agent, the action he is performing is to be the Congress in session, and I think what you are saying logically is that this agent is through—through this agent, you are going to have the Congress in session.

Chairman DERRICK. For purposes of this, yes.

Mr. PASHAYAN. But if the Congress is in session for any purpose, it is going to be subject to a quorum call.

Chairman DERRICK. Why?

Mr. PASHAYAN. Because the Constitution says so. A rule that says the Congress is going to be in session to conduct any kind of a business and yet not be subject to a quorum call violates another

section of the Constitution. That is the intellectual dilemma you are facing.

Chairman DERRICK. It is not my intellectual dilemma, it is yours.

Mr. PASHAYAN. All right.

Chairman DERRICK. On page 10 of your remarks, you assert "enactment of the bill would create a needless point of disagreement between the two political branches." From 1976 to 1981, there were no confrontations over the pocket veto and the Nation got along very well.

Wasn't it really the recent pocket vetoes by the Reagan administration which created the points of disagreement between the branches?

Mr. BARR. The point I was making there was the point I made earlier to Congresswoman Martin, which is that if Congress has this view of the pocket veto clause, there are ways to vindicate it short of expecting the executive branch to sign on to a statute which, as I say, the Department of Justice would not recommend. That was the point I was making there.

Chairman DERRICK. Are there other questions?

If not, thank you, Mr. Barr, for your excellent testimony.

The next panel consists of Mr. David Cole, who is from the Center of Constitutional Rights, New York City. Mr. Cole worked on the litigation challenging President Reagan's intersession pocket veto which led to the Court of Appeals decision in *Barnes* v. *Kline*. And Mr. Steven Ross, general counsel to the Clerk of the House of Representatives. Mr. Ross represented the Speaker of the House and the Bipartisan Leadership Group in the recent *Barnes* v. *Kline* suit.

We are glad to have you.

STATEMENT OF DAVID COLE, CENTER FOR CONSTITUTIONAL RIGHTS

Mr. COLE. Thank you, Mr. Chairman.

Chairman DERRICK. You may proceed as you wish.

Mr. COLE. I thank you for inviting me to testify on this matter.

I was going to respond to some of the issues Mr. Pashayan raised because I think, while logical——

Chairman DERRICK. Go ahead.

Mr. COLE. While logical, I think they are off the mark.

There was a lot of debate in the last 20 minutes about what adjournment is. That is irrelevant. The Supreme Court, in the *Pocket Veto* case, the first case which decided this issue, held that the answer to when a pocket veto can be used is not determined by the type of adjournment. It is determined by when an adjournment prevents return. That determination has to look to the circumstances surrounding the practices of Congress, the modern practicalities.

So it is not a question of, can Congress be called for a quorum call or what kind of adjournment is this. The question is, when is the President prevented from using a return veto? Only in that circumstance can the pocket veto be used.

The *Wright* case, which the Supreme Court decided just 9 years after the *Pocket Veto* case, established precisely that and also es-

tablished that it is permissible to return a veto to Congress when they are not in session, when they are not subject to a quorum call and when they have appointed an agent.

So Mr. Pashayan's logical difficulties were not difficult to the Supreme Court. And they should present no difficulty to this panel.

The Justice Department states repeatedly that what the panel is seeking to do and what this bill would do would be to reverse the *Pocket Veto* case. It does not. The bill would not in any way reverse the *Pocket Veto* case.

The Justice Department has argued that any adjournment over 3 days prevents return, that this rule is required by the Supreme Court case law and that, therefore, this law, which provides a different rule, is inconsistent with that case law and would be attempting to reverse the Constitution. That simply is not true.

First of all, no President and no Congress and no court has ever adopted the "rule," in quotes, that the Justice Department has advanced here today; that is, the 3-day adjournment rule. All the 3-day adjournment rule is is a wholly formalistic way to attempt to reconcile the specific factual contingencies of the two Supreme Court cases.

In the *Wright* case, you had a short 3-day adjournment, and in the *Pocket Veto* case, you had a 5-month adjournment. What does the Justice Department say? They say, well, since *Wright* says a return veto was appropriate in the 3-day period, we can't go shorter than 3 days but we are going to draw the line at that point. There is no sense to the line beyond that.

In fact, it is contrary to the purposes of the pocket veto clause; it is contrary to the practice of Presidents and Congress, and it is contrary to all court decisions in this area. First, as to purposes it would turn the pocket veto, which was designed as a defensive mechanism, a protective mechanism, to protect the President's right to consider bills, into an offensive weapon which would allow him to have absolute vetoes when it is unnecessary to do so.

Second of all, it is contrary to the Supreme Court's statement in the *Pocket Veto* case. They keep talking about the *Pocket Veto* case, but they ignore the fact that the *Pocket Veto* case said you can't decide this question simply by the type of adjournment. It is not a question about what kind of an adjournment it is. It is a question of whether or not the President has in fact been prevented from using a return veto.

If he is prevented from using a return veto, he must use the pocket veto. If he is not prevented and if he is able to return a veto, and to an agent, it is perfectly appropriate for him to use that return veto. That protects his power to consider the bill and that protects Congress' power to override. That is ultimately all that the pocket veto clause is about.

It is also contrary to practice. President Reagan, who first proposed this rule, and now President Bush is following in his footsteps, repeatedly used return vetoes during adjournments of more than 3 days. Were all of those vetoes unconstitutional? The Justice Department's position would suggest that each one of those vetoes that President Reagan used in an adjournment of more than 3 days would be invalid. Are we going to call into question each one of those vetoes?

Is the President actually prevented from returning a bill by an adjournment of more than 3 days? President Ford certainly wasn't. President Ford returned bills during intrasession adjournments and intersession adjournments of many months duration. President Carter wasn't. President Carter returned vetoes during intersession adjournments. He returned them during intrasession adjournments of well over 3-days' duration. President Reagan wasn't. He wasn't prevented.

So there is clearly no practical basis for the Justice Department's position as well.

They argue that the real purpose here, other than the purpose of protecting the President's right to consider a bill for 10 days and not have Congress duck out and prevent the return, is to avoid delay. We don't want delay and therefore we are going to have this 3-day rule because that way Congress would be able to reconsider immediately upon return of the veto.

Ironically, their rule would increase delay, not decrease it. Under their rule, every time you have a more than 3-day adjournment, every time Congress takes a 3-day weekend or 4-day weekend, you are going to have pocket vetoes and the Congress is going to have to restart the whole legislative process on each one of those bills if it chooses to revisit the matter. Certainly that is going to cause more delay than the current situation.

There is also no requirement in the Constitution about immediate reconsideration of bills. As the Justice Department well knows, Congress often gets return vetoes back in one session of Congress and doesn't vote to override until the next session of Congress, after many adjournments have intervened.

There is nothing unconstitutional about that. The Justice Department has never said that is unconstitutional. So all the concern about delay is, I think, essentially facetious.

Last, the Justice Department argues that Congress cannot change the Constitution. There is no doubt about that. But Congress is not changing the Constitution; they are not altering the meaning of the Constitution.

The pocket veto clause says that the President can use the pocket veto when Congress, by their adjournment, prevents his use of a return veto. "Prevent" is a conditional term. That is what the Court held in the *Pocket Veto* case. That is what they held in the *Wright* case.

All that this bill is attempting to do is to clarify for the President as to how he can return a bill and when he is in fact prevented from returning a bill so that he will have his right to consider bills and register his objections. It is not like changing his 10-day period for consideration to a 20-day period.

It says in the Constitution he shall have 10 days. That is a clear rule. It is objective. It is 10 days. But the rule here doesn't say when Congress is out for more than 3 days, the President can use the pocket veto. What the rule is saying is, when Congress prevents him from returning the bill and only when Congress prevents him from returning the bill, he can use the pocket veto.

So this bill would not in any way change the meaning of the Constitution. If anything, the Justice Department's position is changing the meaning of the Constitution.

If the Framers meant that a 3-day adjournment or more than 3-day adjournment would prevent return, they could have said that, but they didn't say that. They made the clause conditional, and the reason they did so was because they recognized that what this is designed to do is to protect the President's right to consider bills for 10 days but also to protect Congress' right to override.

So only in those circumstances where Congress attempts to take away the President's power can the President take away Congress' power. In any other circumstance, the usual legislative process, that is congressional consideration, Presidential objections and return, and congressional consideration of override should be the rule.

The Justice Department says that this rule would read adjournment out of the constitutional clause, but the Justice Department's proposal would read prevent out of the constitutional clause.

I am limiting myself to responding to the Justice Department, because in our written remarks we have set forth our affirmative position, which basically is that we support H.R. 849 with a minor amendment which we have suggested, so that the law would state, "no adjournment of either House of Congress other than an adjournment sine die to end the Congress prevents the return of the bill by the President as long as the originating House has appointed an agent to receive it."

If you don't have the latter clause in the statute, then it appears that you could construe the rule to mean that even if Congress doesn't appoint an agent to receive a return veto, it is telling the President he has to attempt to return the veto, and that can't be. But it is clear that as a matter of practice, both the House and the Senate do appoint agents, and every court that has addressed this issue, the Supreme Court included, has said that that is an appropriate way to deal with this problem. It is a sensible way. It protects the purposes that the clause was designed to protect.

I don't think this provision will resolve the question. I think that is quite clear from the Justice Department's position here. If the Justice Department continues to maintain its insistence on a 3-day rule, then ultimately I think the courts will have to decide it. That doesn't mean that it is not appropriate for Congress to state formally its position through this kind of a bill.

I think it is a sensible position. It is perfectly consistent with the Court's decisions in this area. It is perfectly consistent with the Constitution. It will be a good idea to pass it and I think it would be a very bad idea for President Bush to maintain what the courts have rejected as a purely formalistic rule that makes no sense whatsoever and attempt to veto it.

Thank you.

Chairman DERRICK. Thank you very much.

[Mr. Cole's prepared statement of follows:]

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TESTIMONY OF DAVID COLE, CENTER FOR CONSTITUTIONAL RIGHTS, ON H.R. 849, A BILL TO CLARIFY THE LAW REGARDING USE OF THE POCKET VETO

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I. INTRODUCTION

On behalf of the Center for Constitutional Rights, I thank the Rules Committee for inviting me to testify as an expert on the pocket veto. One of the nice things about practicing law is that in litigating a single case, you almost necessarily become a national expert on the issue in dispute. Together with my colleague, Michael Ratner, I filed the case that most recently addressed the pocket veto controversy: Barnes v. Carmen, 582 F. Supp. 163 (D.D.C. 1984), rev'd, Barnes v. Kline, 759 F.2d 21 (D.C. Cir. 1985), vacated as moot, Burke v. Barnes, 107 S. Ct. 734 (1987).[1] Had the law that was the subject of the challenged pocket veto in that case not expired, thus rendering the case moot at the Supreme Court level, the pocket veto controversy might well have been laid to rest. I support H.R. 849, with a minor amendment, as another step on the road toward resolving the important issue of when the President can and cannot use the pocket veto.

The only change I would recommend is the addition of a

[1]We filed the suit on behalf of thirty-three members of the House of Representatives. Shortly after we filed the suit, the Senate and the House bipartisan leadership voted to intervene on our side of the litigation.

clause regarding appointment of an agent to receive the return veto. I would suggest that the relevant part of H.R. 489 be amended to read: "No adjournment of either House of Congress, other than an adjournment sine die to end a Congress, prevents the return of a bill by the President as long as the originating House has appointed an agent to receive it."

Whether this provision will resolve the dispute concerning the pocket veto will depend to a large extent on the cooperation of the Executive. But even without that cooperation, it sets forth a bright-line rule that is consistent with the purposes of the Constitution, that makes good sense, and that puts the President on notice that he can, and therefore must, use a return veto in all circumstances other than a final adjournment to terminate a Congress.

II. THE CONSTITUTIONAL PRINCIPLES

Article I, Section 7, Clause 2 of the Constitution governs the use of the pocket veto. It states:

> If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a law, in like Manner as if he had signed it, unless Congress by their adjournment prevent its Return, in which Case it shall not be a Law.

The most important characteristic of the provision is that it is conditional, not absolute. It permits use of a pocket veto only when Congress has "prevented" a bill's return. This is because the pocket veto was designed as a narrow, defensive

mechanism to safeguard the President's ability to require Congress to reconsider bills, and not as an offensive device to foreclose the possibility of reconsideration.

The Framers strongly felt that the opportunity for Congress to override Presidential vetoes was an essential element of the lawmaking process. Thus, they gave to the President only a "limited and qualified power to nullify proposed legislation by veto." Chadha v. INS, 462 U.S. 919, 947 (1983). In extended debate, the Framers roundly criticized an alternative proposal to give the President an absolute veto. Benjamin Franklin objected that such a power would render "the Legislature into a compleat subjection to the will of the Executive." 1 Farrand at 99. Roger Sherman spoke against "enabling any one man to stop the will of the whole," because "[n]o one man could be found so far above all the rest in wisdom." Ibid. George Mason believed that an absolute veto would "give up all the rights of the people to a single Magistrate." Id. at 102. When the proposal for an absolute Presidential veto came to a vote, the Convention rejected it by a unanimous vote of ten States to none.

As the Supreme Court has explained, the veto provisions contained in Article I, Section 7, Clause 2 were designed to protect the integrity of the carefully balanced system that the Framers designed for sharing legislative power between the Branches:

> The constitutional provisions have two fundamental purposes; (1) that the President shall have suitable opportunity to consider the bills presented to him and (2) that the

> Congress shall have suitable opportunity to consider his objections to bills and on such consideration to pass them over his veto provided there are the requisite votes.

Wright v. United States, 302 U.S. 583, 596 (1938). To maintain both purposes, use of the pocket veto power must be limited to its intended defensive function: to ensure that the President is not deprived of his veto power by Congress adjourning without making provisions for receiving a return veto. If Congress attempts to deprive the President of the opportunity to return a bill, that is, if it "prevents" the bill's return, the pocket veto provision guarantees that the President will be able to veto bills notwithstanding Congress's actions. However, if Congress provides the President with the ability to return a veto -- as Congress now customarily does, by appointing an agent to receive messages from the President -- the Constitution mandates "that the Congress shall have suitable opportunity to consider his objections" and to override his veto.

As amended by my suggestion, H.R. 849 would limit the use of the pocket veto to final adjournments, as long as agents are appointed to receive a return veto. This is perfectly consistent with the Constitution. During all non-final adjournments, appointment of an agent to receive Presidential messages guarantees that the President can exercise his veto power by returning bills with his objections. As Professor Charles Black has explained, Congress's designation of an agent to accept veto messages alleviates the problem that the pocket veto provision was designed to forestall:

> The "pocket veto" was put into Article I to prevent Congress frustrating the President's veto power by adjournment. When Congress sets up arrangements which eliminate that effect of adjournment, there is no reason why the "pocket veto" should continue to have force; indeed, it no longer has any warrant in the literal text, if one reads that text freshly. The text does not say, or necessarily imply, that adjournment will always "prevent" return; it provides only for the case where it does.

Black, Some Thoughts on the Veto, 40 Law & Contemp. Probs. 87, 101 (1976) (emphasis omitted).

A non-final adjournment during which the Houses have arranged for the receipt of Presidential messages neither frustrates the President's veto power nor forecloses Congress's right to override. All pending business carries over the adjournment, whether intrasession or intersession. Congress may during its second session properly consider whether to override a veto exercised during its intersession adjournment.

So long as agents have been appointed, therefore, the only point at which return is actually "prevented" is a final adjournment at the end of a Congress. A final adjournment is the expression of Congress's determination not to resume legislative business. Return of a bill after final adjournment would be futile, because the new Congress could not override the veto of the previous Congress's bill: all legislative business starts anew. See Kennedy, Congress, the President and the Pocket Veto, 63 Va. L. Rev. 355, 381 (1977).

III. THE CASE LAW

The constitutional principles set forth above are fully supported by the case law, the culmination of which is the D.C. Circuit Court of Appeals' decision in Barnes.

The Supreme Court has addressed the merits of the pocket veto issue only twice. In the Pocket Veto Case, 279 U.S. 655, 680 (1929), the Court established that the pocket veto clause is conditional, and that whether return is "prevented" will vary with the circumstances: "the determinative question in reference to an 'adjournment' is not whether it is a final adjournment of Congress or an interim adjournment, such as an adjournment of the first session, but whether it is one that 'prevents' the President from returning the bill."

In that case the Court sustained President Coolidge's pocket veto of a Senate bill during a five-month intersession adjournment, because neither House had appointed an agent to receive vetoed bills from the President during an adjournment. The Court stated in dictum that "the delivery of the bill to such officer or agent, even if authorized by Congress itself, would not comply with the constitutional mandate." 279 U.S. at 684. Because there was no practice of accepting Presidential messages during adjournments, the Court concluded that return to an agent would engender disputes over the date of delivery of a bill and public uncertainty about a bill's status. The Court found that under such conditions, delivery to a House in session would remove those concerns.

Nine years later, in Wright v. United States, 302 U.S. 583

(1938), the Court ruled that delivery to a House in session is not the only solution to these problems. At issue there was President Roosevelt's return veto of a Senate bill while the Senate was in a three-day recess, but the House of Representatives was sitting. The Secretary of the Senate had accepted the veto message and had presented it to the Senate when it reconvened. The Court rejected the plaintiff's claim, based squarely on the Court's earlier opinion in the Pocket Veto Case, that the President's return veto had been invalid. The Court held:

> In returning the bill to the Senate by delivery to its Secretary during the recess there was no violation of any express requirement of the Constitution. The Constitution does not define what shall constitute a return of a bill or deny the use of appropriate agencies in effecting the return.

Id. at 589. (emphasis added). The Court noted that its contrary statement in the Pocket Veto Case that the Constitution forbade return of a bill to an officer during an adjournment was dictum and did not control its judgment. Id. at 593-94.

Thus, the Supreme Court established in Wright that, contrary to its earlier statement in the Pocket Veto Case, the use of congressional agents to receive Presidential veto messages is not prohibited by the Constitution, and is appropriate where the dangers of uncertainty and delay discussed in the Pocket Veto Case are "illusory."

The pocket veto issue did not reach the courts again until Kennedy v. Sampson, 511 F.2d 430 (D.C. Cir. 1974), in which the D.C. Circuit held that under modern conditions, a return veto is

not prevented by an intrasession adjournment of any length, so long as the originating House has arranged for receipt of veto messages during the adjournment. The Executive chose not to appeal Sampson. Two years later, Kennedy v. Jones, 412 F. Supp. 353 (D.D.C. 1976), appeared to resolve the only remaining issue, when President Ford agreed to a consent judgment extending the Sampson holding to an intersession veto. President Ford agreed to use return vetoes in all non-final adjournments, provided that the originating House had appointed an agent to receive the return veto message.[2]

Presidents Ford and Carter both followed this agreement, thereby demonstrating by their practice that indeed return of a bill was not prevented by adjournment as long as the bill could be delivered to a duly appointed agent. President Reagan also regularly used the return veto during adjournments by returning the bill to an agent. However, he declined to use the return veto during intersession adjournments, and his use of the pocket veto in such a circumstance led to the Barnes case.

In Barnes, the court of appeals held that under modern

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[2]As Attorney General Levi explained:

> President Ford has determined that he will use the return veto rather than the pocket veto during intra-session and inter-session recesses and adjournments of the Congress, provided that the House of Congress to which the bill and the President's objections must be returned according to the Constitution has specifically authorized an officer or other agent to receive return vetoes during such periods.

122 Cong. Rec. 11202 (1976).

conditions, as long as an agent has been appointed to receive veto messages, the President is not "prevented" from returning a bill with his objections except by a final adjournment to end a Congress. Barnes v. Kline, 759 F.2d at 41. In the Barnes case, the Executive departed from its position under Presidents Ford and Carter, and advanced the rather extreme position that return of a bill is prevented, and therefore the pocket veto required, during all adjournments of Congress longer than three days. The Executive chose this period because the adjournment at issue in Wright was three days, and attempted to ground it in the Constitution by pointing to the surely irrelevant fact that an adjournment of more than three days by either House requires the agreement of the other House.[3] As the D.C. Circuit correctly stated, this "rationale" has no basis in the purposes of the pocket veto, and would have had the effect of transforming the pocket veto from a defensive mechanism designed to safeguard the President's role in the normal legislative process, into an offensive tactic that could as often as not short-circuit that process altogether, by giving the President an absolute veto. 759 F.2d at 41.

IV. MODERN CONDITIONS

The basis for the evolution in pocket veto jurisprudence

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[3]The Executive's argument was contradicted by President Reagan's own veto practice, for under the three-day rule ten of President Reagan's twenty-six return vetoes up to that point in time would have been nullified.

outlined above is the development of a congressional practice of using agents to receive veto messages. The Court's concern in the Pocket Veto Case about the uncertain status of a bill returned to Congress during adjournment resulted from the lack at that time of a tradition of receipt of Presidential messages by congressional agents. 279 U.S. at 683-84. The Court feared that return to an "agent not authorized to make any legislative record of its delivery ... [would] leav[e] open possible questions as to the date on which it had been delivered to him, or whether it had in fact been delivered to him at all." Id. at 684.

Because both Houses now formally direct agents to accept veto messages, contemporary practices have rendered the Court's concern "illusory." Wright, 302 U.S. at 595. During all contemporary intrasession and intersession adjournments and recesses, just as in the recess in Wright, "the organization of the House and its appropriate officers continue to function without interruption." Ibid. Continuation of the institutional functions of the Houses ensures a clear and certain public record of any messages received from the President. The nature of an adjournment does not affect the public recording of a Presidential veto, and return of bills to a congressional agent has never occasioned a dispute about the date, or fact, of their delivery. As the D.C. Circuit concluded in Sampson, "Modern methods of communication make it possible for the return of a disapproved bill to an appropriate officer of the originating House to be accomplished as a matter of public record accessible to every citizen." 511 F.2d at 441.

Delay in Congress's reconsideration of a vetoed bill is never a sufficient ground alone to justify the President's use of a pocket veto instead of a return veto, because, as the D.C. Circuit pointed out in Sampson, "the Constitution itself sets no time limit upon Congress' right to override a presidential veto." 511 F.2d at 440 n.27. The Constitution sets a time limit on the President's action, so that he cannot indefinitely impede a law's enactment. No such restraint is necessary on the Congress, whose interest is in attempting to override the President's veto. Accordingly, although the Constitution provides that the originating House "shall enter the [President's] Objections at large on their Journal, and proceed to reconsider [the vetoed bill]," art. I, sec. 7, cl. 2, it does not limit the interval that may elapse between the date of the President's veto and the date of Congress's vote whether to override.[4]

Presidential and congressional practice cannot, of course, alter the meaning of the Constitution. See Chadha, 462 U.S. at 942 n.13. The question posed by the pocket veto clause, however,

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[4]Indeed, the Constitution does not require that the originating House ever vote on whether to override a veto. The House may fulfill its constitutional obligation to "proceed to reconsider" a vetoed bill in any number of ways, including "laying it on the table, referring it to a committee, postponing reconsideration to a day certain, or immediately voting on reconsideration." 7 Cannon's Precedents of the House of Representatives, §1105 at 180-81 (1936). Therefore, under the constitutional scheme established by the Framers, the time lag between a Presidential veto and congressional reconsideration is an irrelevant concern, and the risk of delay before Congress votes on overriding a veto does not affect the President's ability to return a bill to Congress.

is whether Congress has "prevented" the President from returning a bill during a particular adjournment. Where practices and circumstances have changed the answer to that question, the clause contains the flexibility to reflect that change, because "[t]he text does not say, or necessarily imply, that adjournment will always 'prevent' return; it provides only for the case where it does." Black, supra at 101. The pocket veto clause is not one of those constitutional provisions whose application is fixed by a contemporaneous interpretation by the First Congress. Marsh v. Chambers, 463 U.S. 783, 790 (1983); J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 411-12 (1928). Instead of adopting a fixed definitional approach, the Framers established a conditional rule to guarantee both that Congress could not deprive the President of his qualified veto and that the President in turn could not deprive Congress of its right to reconsider vetoed bills. Knowing that they could not accurately predict details of the organizational practices of the government, the Framers left it to events to determine when the condition obtained.

H.R. 849 reflects, in a clear and simple rule, the House's understanding that under modern conditions, the only appropriate situation for the use of the pocket veto is a final adjournment. That rule, with the addition of a clause concerning the appointment of agents to receive return vetoes, is fully consistent with the law that has developed in this area, and makes good constitutional sense.

It is still possible that this dispute will not finally be

resolved until the Supreme Court is able to address the issue head on, with a live law. But the Court is not the only branch of government entitled to state its understanding of the Constitution. Because this question has everything to do with the procedures of lawmaking, it is appropriate that the House formally state its position through H.R. 849. This will serve to place the President on notice, and may result in an agreement from the Executive to abide by this common-sense rule. And while it would not be dispositive of any subsequent court case, it would play a hand in the issue's resolution, by reinforcing the common-sense position that the Court of Appeals in Barnes articulated.

Chairman DERRICK. Mr. Ross.

STATEMENT OF STEVEN R. ROSS, GENERAL COUNSEL TO THE CLERK OF THE HOUSE OF REPRESENTATIVES

Mr. Ross. Good afternoon, Mr. Chairman. I have submitted to the committee written remarks.

Chairman DERRICK. They will be accepted, without objection, and you may summarize if you like.

Mr. Ross. If they have been included in the record, then I will limit my remarks this afternoon to several points, many of which were raised during the presentations this morning by Mr. Barr and others with regard to this proposed legislation.

Let me start out by saying, and I wanted to comment on the bipartisan nature of the prior litigation on this area. You had asked the question of whether this is a bipartisan area of dispute or not.

In my office's role representing the House, Members' offices and committees, we represented the Speaker and bipartisan leadership in the Barnes pocket veto litigation. The leadership group that we represented not only was bipartisan but included two people who were honored alumni of this committee, Speaker O'Neill and now Senator Lott.

There was no partisan disagreement with respect to the position which the House should take in that litigation, a position which was upheld by the Court of Appeals. What this proposed legislation before this committee at this point does is codifies what the Court of Appeals declared its view of what the law was with respect to pocket vetoes.

Let me state that the proposed legislation does not effect any change in the Constitution. If this legislation is enacted or not, the Constitution will still read as it does that the President can employ the unique device of a pocket veto where he is prevented by adjournment from returning a bill with his objections.

The legislation does not overturn any Supreme Court opinion. It is consistent with the opinions of the Supreme Court and the lower courts with respect to this issue. It simply places on the record as a matter for the knowledge of both the President and the Congress as well as the American people what type of adjournment would prevent a bill from being returned, and thus it would clarify the situation of when something other than the normal course of business, which is when a President objects to a bill, that he returns it with his objections, when something other than that normal course of business and procedure should be followed.

The Constitution is a document of few words. Those who have studied it remark on many occasions that if you study the Constitution, there are not phrases that appear for no purpose. The men who met in Philadelphia to craft what has been the blueprint for our Nation's governmental system chose their words carefully, and in looking at the phrasing that they used for this section of the Constitution, it is clear that the phrase "prevents its return" is not mere surplusage.

If the Constitutional Convention wanted simply to say, as the Department of Justice suggests, they intended that the President can employ a pocket veto whenever Congress had adjourned, it could

have said that. The document would have been that much shorter. They could have simply said, used that phrase, and said "unless the Congress is adjourned." They did not say that. They said "unless the Congress, by their adjournment, prevents its return."

That additional language must have some meaning. Clearly, what its meaning is, that this portion of the Constitution, the pocket veto procedure, is to be available to the President to protect his right and the President plays a very large role in the legislative process. The President is able by simply mustering the support of a minority of one third of either House of Congress, to prevent the elected Representatives of the American people from enacting something into statute.

When that power was given to the President, it was clearly not intended as an absolute veto. Clearly, the Congress had reserved unto it the ability to override the President's veto. A pocket veto deprives the Congress of that right. It therefore must be viewed with a certain degree of skepticism as to when the President is empowered to utilize that unique and powerful ability to reject a congressional enactment without subjecting it to the possibility of being overridden.

Therefore, it appears to me that the narrow reading, which is what the courts have given the phrase, the logical reading because it gives full import to each and every word of the Constitution rather than ignoring a critical phrase, is that it is only a pocket veto which truly prevents the President from returning a bill with his objections that occasions the use of a pocket veto.

You had raised the question, if there has been anything other than a practical development over the course of our Nation's history that has perhaps changed the constitutional footing on which this question is viewed, one potential to look at is the enactment of the 20th amendment which radically altered the way Congress does business in terms of adjournments. Prior to that amendment, you had a situation in which the Congress would normally meet for one long session and then a shorter lame-duck session.

Following the change of the scheduling of the congressional calendar occasioned by enactment of the 20th amendment, you have the modern era of Congress being in session much more year round, with the sessions being annual sessions starting in January and lasting as long as necessary, and the modern experience has been it has been necessary to be in session virtually throughout the year.

Turning to the extreme nature of the Department's position, I was taken by how willing the Department of Justice continues to be to propound a very extreme position on the question of the pocket veto. Their position is contrary to the opinion of the D.C. Circuit as expressed in the litigation that the bipartisan leadership participated in. It is contrary to the opinion of Judge Bork when he served as Solicitor General. It is contrary to the agreement reached between the executive branch and the Congress during the administration of President Ford.

It would have the practical effect—it is not simply enough to say, well, we are only looking at those adjournments over 3 days. One should look at what that means in terms of legislation and what things the President would now be able to pocket veto if the De-

partment was to be believed, and what things he could not pocket veto if the alternative is accepted.

Virtually every major piece of legislation ends up being enacted and sent down to the President immediately prior to the Congress leaving for adjournment of some length. That is a fact of life of the way we do business. Those momentous type of decisions tend to be deferred till right before the Congress is about to leave.

All of that major legislation would end up being the, potentially, subject of a Presidential pocket veto and, thus, a utilization of a Presidential negative without the ability for the Congress to override that objection.

We included in our submission to the Court a table which studied the last few recent Congresses and how radical a departure from present practice the Department's position on pocket veto would enact.

Mr. Barr, on behalf of the Department, contended to the committee that the Supreme Court had decided and had decided against the notion that the appointment of an agent to accept the President's return message was not sufficient. Let me say I strongly disagree with his reading of the precedents, as did the D.C. circuit which rejected that position when it was put forward by the Department.

There are several instances in which that notion has been rejected. The main one was by the Supreme Court itself in the *Wright* case, and I also note for some historical interest that the Court's language in the *Pocket Veto* case with respect to the agent was merely dictum rather than the holding of the case. That is a view that while we put forward was propounded not only by the House, but by a former Assistant Attorney General for Legal Counsel, one of Mr. Barr's predecessors, whose name is William Rehnquist, presently the Chief Justice, who remarked with respect to that precise language, "I think most people would concede that was what you might call dicta, that that was not necessary to the decision of the case," during his testimony on the constitutionality of the President's pocket veto power before the Senate Subcommittee on Separation of Powers.

So I think that Mr. Barr's reading of that language is new wisdom to the Department of Justice, and conflicts with the better wisdom evidenced by his predecessor, the new Chief Justice, as well as the former Solicitor General, Mr. Bork, and as well as the decisions of the courts.

Clearly, the position of the Department has less to do with the mechanics of utilizing the pocket veto and more to do with their proposition that the Congress is obligated under the Constitution to give immediate consideration to the President's objections upon return of the vetoed bill. That proposition has been consistently rejected by the Congress, which for almost 200 years of its history has declared and has held on unto itself the role of determining when Congress should consider the President's objections.

Mr. Chairman, you are well aware that with respect to the veto of the textile bill, that the Congress received the President's objections and did not bring up a vote to override for some 8 or 9 months. That was in the regular course of congressional procedure, and the Congress, both House and Senate, have followed that pro-

cedure and have brought the matter to a vote when the committees and the leadership and the House determined it was appropriate. The Department does not like that.

The President would like a system in which when he returns a bill with his objections are voted on up or down. That simply is not the law. The Constitution does not provide for that.

The decisions on whether or not a pocket veto can be exercised should be made in light of what the language of the Constitution is, what the courts have said, and not what the President would like the Constitution to read.

Thank you.

Chairman DERRICK. Thank you, Mr. Ross.

[Mr. Ross' prepared statement follows:]

STATEMENT OF STEVEN R. ROSS
GENERAL COUNSEL TO THE CLERK OF THE HOUSE OF REPRESENTATIVES

Mr. Chairman, and Members of the Subcommittee on the Legislative Process, the Subcommittee's hearing on H.R. 849, a bill to clarify the law surrounding the President's use of the pocket veto, provides a welcome opportunity to address an issue of importance to the House of Representatives as an institution. As General Counsel to the Clerk -- the office which represents the House, its Members, officers, and employees, in litigation -- I appeared on behalf of the Speaker and Bipartisan Leadership Group of the House in the recent litigation regarding the pocket veto. Other witnesses are addressing the pocket veto question from various aspects; I would like to address specifically that litigation, and particularly the House's role and experience in that litigation.

On November 18, 1983, Congress presented the President with H.R. 4042, 98th Cong., 1st Sess., a bill concerning human rights certification for El Salvador. This bill represented the culmination of years of Congressional consideration, particularly of the need for what the legislative history insisted on: "investigat[ion] of the murders of the six United States citizens in El Salvador." S. Rep. No. 83, 97th Cong., 1st Sess. 76 (1981).

President Reagan, who decided against the bill, chose not to return veto the bill. Instead, on November 30, 1983, the White House issued a statement announcing a pocket veto. A group of plaintiff House Members filed suit against Executive Branch defendants. The Speaker and Bipartisan Leadership Group intervened

as plaintiffs to protect the institutional interests of the House. The Senate also intervened. While the district court initially ruled for the Executive defendants, on appeal, the Court of Appeals reversed and established what the Congress now considers the operative law of the pocket veto. Although the Supreme Court reviewed the decision, it simply held the case moot on technical grounds -- the expiration of the year during which the human rights certification bill would have applied -- without questioning the D.C. Circuit's reasoning on the merits.

Specifically, pocket vetoes arise because of Article I, section 7, clause 2, of the Constitution, which states that "If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the congress by their Adjournment prevent its Return, in which Case it shall not be a Law." The question in the case was whether the House, by an intersession adjournment between the two sessions of the Ninety-Eighth Congress, had "prevent the return" of the bill. The D.C. Circuit held that "The existence of an authorized receiver of veto messages, the rules providing for carryover of unfinished business, and the duration of modern intersession adjournments, taken together, satisfy us that when Congress adjourned . . . return of [H.R. 4042] to the originating house was not prevented." 759 F.2d at 41.

You will note that these crucial points -- which we had argued on behalf of the House -- all concern matters under Congress's

control. It is Congress which authorized officers to act as receivers of veto messages -- specifically, the House of Representatives by rule authorizing the Clerk of the House to receive such messages. It is Congress which provides for the carryover of unfinished business, from the first to the second session of each Congress. Finally, it is the Congress which decides the duration of adjournments, both intrasession and intersession. It is the Congress which controls all the circumstances surrounding whether "the Congress" has "prevented" the bill's return. Thus, we argued -- and the D.C. Circuit agreed -- that the Congress, by circumstances making clear it has facilitated, not prevented the bill's return, can avoid pocket vetoes during intrasession or intersession adjournments.

This bill, H.R. 849, would in our view make even more clear this fundamental point. By declaring that "No adjournment of either House of Congress, other than an adjournment sine die to end a Congress, prevents the return of a bill by the President," the bill would, in effect codify the law established by the Congress's actions and the D.C. Circuit's recognition of those actions.

Although some may think that this bill treats an abstract subject, in fact the impact of the pocket veto is very great. The testimony by the Office of Legal Counsel of the Department of Justice reaffirms the view the Justice Department expressed in court. That view is the notorious "three-day" rule that the President can pocket veto bills whenever the Congress adjourns over three days. This argument means that whenever Congress takes a

three-day weekend, the President can veto bills without any chance of an override, even if two thirds of each chamber would override him given the opportunity.

We argued in court, successfully, that the "three-day" rule would have devastating implications for the balance between the political Branches. To illustrate, of the most important bills in the 1981-82 Congress, the bills that went through conference, out of 82 bills through conference, pursuant to the "three-day" rule, the President could have pocket vetoed 61, and would have had to return veto only 21. In other words, contrary to the Framers' intent that Congress have a chance to override, 61 out of 82 times, -- or 74% of the time -- the President could have an absolute veto. In 1983-84, the same figure would have been pocket vetoes for 455 out of 83. As the D.C. Circuit said in recognition of this, the proposed "three-day" rule "deprives Congress of the final word on a significant portion of its legislation and grants the President an absolute veto." 759 F.2d at 38.

In light of that sweeping claim to absolute power, it is valuable for the Congress to make even clearer that what the D.C. Circuit held was the law, is the law. Codifying the D.C. Circuit holding would be a valuable way of further evidencing the rejection of that claim, and enshrining sound principles in this context.

Chairman DERRICK. Mr. Cole, Mr. Ross, thank you for your excellent testimony. I agree with you both. That makes it even better. Do you have questions?

Mr. WHEAT. A couple questions, yes.

Chairman DERRICK. Go ahead.

Mr. WHEAT. Do you agree with Mr. Pashayan who suggested that adjournment is adjournment and that anything other than that means that Congress is in session?

Mr. Ross. If I could address that, at one point in the earlier litigation the Department seemed to be expressing the same view. If any adjournment of the House was to mean that the President was prevented from returning, then the President decided to return a bill at 2 o'clock in the morning, he would be prevented from doing so, and one could utilize his pocket veto. That clearly is not the case, and the Department of Justice backed off its position as the litigation developed because they were unwilling to carry the very heavy burden of suggesting that if the Congress happened to adjourn because of the end of business for the day, that the President was thereby empowered to negative an enacted bill because there was nobody, because the Congress was not in session.

Even within the constitutional language with respect to when the House must get concurrence from the Senate and vice versa, it talks about adjournments which will be for more than 3 days. Clearly, the Constitution and the Framers were well aware that at the end of the day Congress adjourn and goes home for the day. It comes back tomorrow. The session of Congress is still continuing. The President is not prevented from returning a bill.

In fact, the vast majority of Presidential returns are effected and returned—in making returns to agents of the Congress. The White House and the Houses of Congress, through their Secretary and Clerk, have developed a workable mechanism by which the bills are transferred down to the President for his consideration and received back when he wants to return them.

These returns occur in a variety of ways. Normally they are returned to the Clerk's Office, though there have been occasions when a representative, duly authorized representative of the House has met the duly authorized representatives of the President at a gas station, for example, on their way home to receive the President's objections to the bill. That was proper because there were actions on behalf of the President and the Congress by their duly authorized agents.

Mr. WHEAT. Thank you.

Chairman DERRICK. The Justice Department expressed the view that the President ought to be able to pocket veto any time that the House, or at least the body of origin is adjourned for 3 days. Is there any basis for this in the Constitution?

Mr. Ross. No. What the Department is doing is trying to grasp for some constitutional straw to try to provide a logical underpinning for their position.

There is no natural connection between the language of the pocket veto clause of the Constitution and the 3-day provision. In fact, the suggestion that they make is internally inconsistent because the 3-day provision includes the word adjourned. That says

that in a way there could be adjournment of less than 3 days that would not require concurrence from the Senate.

So I see no constitutional logic or any evidence in the discussions either at the Convention or in consideration of the Constitution by the States that supports the connection of those two phrases.

Chairman DERRICK. Mr. Cole, do you agree with that?

Mr. COLE. Yes. In fact, and more importantly than my agreeing with it, the D.C. circuit agreed with it, and in addressing that specific argument, concluded that it has "no textual grounding whatsoever in the Constitution."

As I said before, if we talk about being consistent with the literal terms of the Constitution and Congress not changing the Constitution, if the Framers intended there to be a 3-day rule, they knew how to put a 3-day rule in. They didn't do that.

What they put in was a conditional term that says that when Congress, by their adjournment, "prevents" the President from using the return veto, a pocket veto is appropriate.

Chairman DERRICK. That "prevent" is something that frankly I had skipped over. That puts an entirely different light on it.

Do you think if we tried but failed to enact this legislation, that it will be a hindrance in future lawsuits which will be relied upon by the courts?

Mr. COLE. I don't think so. I think the House—the bipartisan leadership of the House and the entire Senate made their position very clearly known in the *Barnes* case, and will, I am sure, when this issue arises again, will make their position known again.

I think that if this bill passes, it might provide the basis for agreement at some point with some other President to resolve this problem without a court decision to resolve it. I don't think this problem needs a court decision to resolve it. But as long as the President is going to take the adamant position that he is taking, I think it will ultimately go to the courts.

Whether this particular bill passes or not, the courts are going to decide the matter by looking to the Constitution, but I think what this bill does is it says we, as the House and as Congress, are trying to do everything we can to allow the President to use a return veto under all circumstances, where it is in fact appropriate and possible, and the only circumstances where it is not possible or appropriate is final adjournment because all business dies and it would be futile to return it.

I think that the courts frankly will respect that and if this ever gets to the Supreme Court, the decision will be that the rule that you are suggesting——

Chairman DERRICK. That is the point I was trying to make with Mr. Barr, but he wasn't having any part of it.

Mr. Wheat.

Mr. WHEAT. I appreciate and understand your argument that the Founding Fathers could have written in a 3-day rule if they thought it appropriate. How would you respond to the argument that they could just as easily have written clearer words to say that final adjournment would be the adjournment that would prevent Congress from considering the Presidential veto?

Mr. COLE. Well, at the time they were—when the Constitution was framed, the understanding, and the D.C. circuit addresses this

as well, was that after sessions of Congress, legislation would die and not start up again at the second session. That is how it worked in parliament. They presumed and may well have assumed that that might be how it would work in Congress, but they couldn't know for sure and they were not going to make that a constitutional requirement.

Unless you set that forth clearly in the Constitution, you can't really provide a clear rule. So what they said was, well, what we are concerned about here is protecting the President's right to have 10 days to consider, and protecting Congress' right to override. As long as we ensure that the President can return the veto, then the return veto should be used; but when it is prevented and only when it is prevented will we allow the President to use the pocket veto to be sure the Congress doesn't by changing its practices, prevent the President's return.

They didn't put in language about when legislation would die or not die by adjournments because they ultimately wanted to leave that up to the Congress. That is something that through time might well change and evolve, and that is something that the Congress should be able to deal with.

What they were concerned with was Congress attempting to deprive the President of his right. But this bill doesn't do that. This protects the President's right to return the veto at every point.

Mr. Ross. Let me address that for one moment.

As a purely constitutional matter, there is nothing in the phrase, that is the pocket veto clause, that requires that it be applied only to the final adjournment of Congress. Congress could, if it wanted to, set up a procedure that would effectively prevent the President from returning a bill during any other adjournment, and the clause would come back.

What this legislation does, and in light of the procedures of the House and Senate at this point and the change in the rules, is two things. It says, we will be here via our agents or by the House being in session and the Senate being in session to accept the return except during final adjournment.

What this legislative proposal does, it creates a congressional procedure that guarantees the President his right to return. The critical language is still the prevention, not the length of the adjournment.

Mr. WHEAT. Thank you.

Chairman DERRICK. Had we enacted this legislation years ago, would it have helped you in your suit?

Mr. Ross. I believe it would have, and more than that, let me be a lone voice in the wilderness and say that I believe that there is a possibility that—there should be a possibility that enactment of this legislation would forestall the need for litigation; that upon enactment of this legislation, that the rules of the game will be clearly spelled out.

This legislation effects no diminution of the President's authority. It should be sufficient to the President to know when he is empowered to use the pocket veto and when not, and that once the rules are clear, that the President should not have to create a litigative situation by pocket vetoing a bill that would have an impact

on beneficiaries of some sort or another, to set up a test case, that it is sufficient that he has his very great power.

If he doesn't like something in a legislative bill and he wants to object to it, all he has to do is put pen to paper and send one of his messengers back to Congress and he has effectively stopped that legislative proposal if he can garner the support of one third plus one of either of the House or Senate. That great power should be sufficient for his purpose. And it would strike me as being possible that the enactment of this clear declaration of what the rules of the game are going to be would be sufficient to lay the issue to rest for time to come.

It was sufficient for President Ford and the Congress to work out an agreement. By working out an agreement in statute, we are able to work out an agreement that can last as long as the statute lasts.

Chairman DERRICK. Thank you both very much. I thank all of you for coming. Thank you for your excellent testimony.

The committee stands adjourned subject to the call of the Chair. We will not be receiving any veto messages.

[Whereupon, at 12:45 p.m., the subcommittee adjourned, subject to the call of the Chair.]

[The following material was received for the record:]

ONE HUNDRED FIRST CONGRESS

JOHN JOSEPH MOAKLEY, MASSACHUSETTS, CHAIRMAN

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WILLIAM D. CROSBY, JR., MINORITY COUNSEL

U.S. House of Representatives
Committee on Rules
Washington, DC 20515-6269

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July 24, 1989

The Honorable Butler Derrick, Chairman
Subcommittee on the Legislative Process
Washington, D. C. 20515-6271

Dear Butler:

I am writing with reference to your subcommittee hearing Wednesday on the bill (H.R. 849) to amend title 1 of the United States Code to define the type of adjournment that prevents the return of a bill by the President, and to amend the Rules of the House of Representatives to require the Clerk to make certain notifications to the Speaker.

My summer law clerk, Mr. Michael Callan, prepared a memorandum with respect to Kennedy -v- Sampson, which is a good overview of the most recent significant case on the subject. I would request that it be included in the subcommittee's hearing record on H.R. 849.

Sincerely,

John Joseph Moakley

KENNEDY V. SAMPSON
511 F. 2d 430 (1974)

FACTS:

Edward Kennedy, one of the Senators who voted in favor of S. 3418, sued to have S. 3418 declared a law. S. 3418 was presented to the President on 12/14/70. On 12/20/70 Congress adjourned for the Christmas holidays; the Senate until 12/28/70, and the House of Representatives until 12/29/70. Before the recess the Senate authorized the Clerk of the Senate to receive messages in their absense and until the Senate reconvened. The President took no further action with regard to this bill. The President claimed that S. 3418 was "pocket vetoed" under Article 1 section 7 of the United States Constitution. Kennedy, citing the same provision, claims that S. 3418 became law without the President's signiture at the expiration of the 10 day period following its presentation to him.

ISSUE:

A) Does Kennedy have standing to sue?
B) Did S. 3418 become law?

ANALYSIS:

A) The requirement of standing is a relatively technical legal requirement that must be met before a person may bring a lawsuit in a Federal Court. Basically, in order for a person to have standing they must "have a sufficient stake in an otherwise justiciable controversy to obtain a judicial resolution" of that controversy. The Court in Kennedy found standing for him as an individual Senator on a number of

technical theories. First, the Court used the "logical nexus" test. That is, does the act of the President in pocket vetoing the bill have an impact on Senator Kennedy's role as a Senator. Here, the Court answered in the affirmative. If the President is correct on this issue then it would, in effect, nullify Senator Kennedy's vote on the bill. If Senator Kennedy is correct, then it will determine whether the bill became law without the President's signiture. The Court found the nexus to be not only logical, but "real". Both parties have no way of resolving the issue other than in a court of law.

The President's second assertion on the issue of standing is that although the Congress, or the individual Houses as a whole have standing to challenge the President's purported use of the pocket veto, the President insists that no individual member has standing to sue. The Court held that a person can have standing if he is "among the injured, not that he is the most grievously or most directly injured". Over the long term, an individual Senator's power, as a result of this pocket veto would be weakened. "To the extent that Congress' role in the government is thus diminished, so too must be the individual roles of each of its members".

B) Article I section 2 of the United States Constitution provides in relevant part: "Every Bill which shall have passed the House of Representatives and the Senate, shall, before it becomes a Law, be presented to the President of the United States... If any Bill shall not be returned by the President within 10 days (Sundays excepted) after it shall have been presented to him, the same shall be a law, in like manner as if he had signed it, unless the Congress by their

adjournment prevent its Return, in which case it shall not be a Law. The issue in this case is whether the Christmas adjournment of 1970 was one which "prevented" the President from returning S. 3418 to the Senate.

The pocket veto power is an exception to the general rule that Congress may, with a 2/3 majority, override presidential disapproval of a piece of legislation. The pocket veto must be limited to the specific circumstances for which this special exception was created. The 2 fundemental purposes of the pocket veto power as outlined in Edwards v. Habib 52 S.Ct. 395, 400. are (1) that the President shall have a suitable opportunity to consider a bill presented to him, and (2) that the legislature may have the opportunity to hear a President's objections to a bill and on his objections, either override the veto by a 2/3 vote of both Houses, or incorporate his suggestions into a new bill. The pocket veto clause, as the exception to the general rule must be interpreted to include both objectives. Wright v. United States 58 S.Ct. 395, 400.

The United States Supreme Court identified 2 reasons in The Pocket Veto Case for holding that the President may pocket veto a bill in an intersession adjournment of the Congress. The word "House" in the return veto clause means "House in session" and thus does not permit an officer of the chamber to be authorized to receive messages from the President,(2) a return to the House of origin of a bill during an intersession break would result in long delays and a period of uncertainty regarding the status of the bill while it remains in the hands of an authorized messenger. This state would be a legislative

limbo where a bill would languish with the President's disapproval and the members of Congress scattered throughout the country and unable to act on it.

Wright v. United States carved out an important exception to the reasoning in the Pocket Veto case. The Wright court held that a bill may be returned to an authorized officer of the Congress during an intrasession adjournment of Congress. The court stated that to argue that a President had been frustrated in his attempts to return a bill to the House of origin simply by the fact that that House had taken a recess would be to "construct an artificial formality" that would "erect a barrier to the exercise of (Congress') constitutional right." The dangers that were uncovered in The Pocket Veto Case, an intersession break present in the instance of an intrasession break, such as Kennedy. "When there is nothing but such a temporary recess the organization of the House and its appropriate officers continue to function without interuption bill is properly safeguarded for a very limited time, and it is promptly reported and may be considered immediately after the short recess is over."

Next, the Court takes on the issue of the Congress taking the short breaks that it takes periodically during the year. "The modern practice of Congress with respect to intrasession adjournments create neither the hazardous-long delays and public uncertainty-that the Supreme Court had found troubling inThe Pocket Veto Case. Simply put, these intrasession adjournments do not create the hazards that the intersession adjournments create. Furthermore, modern methods of communications make it much easier for the individual members,

scattered across the country in their individual districts, to remain informed by the authorized officer of the Congress. In this situation, both the public and the legislators would be clear as to the status of the bill, to await the imminent return of the Congress The legislators could then act upon the President's veto upon resumption of their deliberations.

The Christmas recess of 1970 did not prevent the return of S.3418 by the President to the Senate. In the case of an intrasession adjournment, the President is not "prevented" from returning an unsigned bill to the appropriate House of Congress, if that House has duly authorized the Clerk to receive, and to record messages in its absense.

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July 5, 1989

The Honorable Butler Derrick, Chairman
House of Representatives
Committee on Rules
Subcommittee on the Legislative Process
Washington, DC 20515-6271

Dear Representative Derrick:

Thank you for your kind invitation to testify on Wednesday July 26, 1989 on a hearing on H. R. 849 dealing with the pocket veto.

Unfortunately, my schedule is such that I will be unable to attend the hearing. I have a doctoral examination at that time and leave shortly thereafter for my vacation.

I did talk to your staff member, Mr. Harrington, and was pleased to hear that both Louis Fisher and Robert Spitzer are planning to testify at the hearing. These are the two leading authorities in the nation on the issue. As you know, Professor Fisher is considered to be one of the most knowledgeable constitutional experts in the country, especially on congressional-presidential issues. And Professor Spitzer has just published a book on the veto power that has an entire chapter devoted to the pocket veto issue.

Were I able to appear, I would support your bill as I feel that the pocket veto should only apply in the case of an adjournment sine die at the end of a Congress. If the house of origin appoints a proper agent to receive the president's objections, I do not feel that that arrangement can be construed as "preventing" the return of the bill. I also think it is

an equal opportunity institution

logical to link the timing of a proper pocket veto to the life span of a bill, which, as I understand it, is the period of the entire Congress in which it was introduced. To allow the pocket veto to apply during intra or inter-session recesses or adjournments is to fashion a kind of "absolute" veto available (but not used since 1707) by the British monarch. The Founders expressly rejected that type of veto at the Constitutional Convention.

Thanks again for you kind invitation, and good luck with your bill. It is badly needed to remedy a situation which the Supreme Court as yet has been unwilling to settle.

Sincerely,

R. A. Watson

Richard A. Watson
Professor

RAW/reb

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July 18, 1989

The Honorable Butler Derrick
Chairman
Subcommittee on the Legislative Process
House Committee on Rules
1629 Longworth House Office Building
Washington, D.C. 20515-6271

Dear Chairman Derrick:

You have informed me that the Subcommittee on the Legislative Process is considering a bill concerning the President's use of the "pocket veto."

As you know, on January 26, 1976, I addressed a memorandum to Attorney General Edward Levi recommending that he ask authorization to state on behalf of President Gerald Ford that the President would "use the return veto rather than the pocket veto during intra-session and inter-session recesses and adjournments of the Congress, provided that the House of Congress to which the bill and the President's objections must be returned according to the Constitution has specifically authorized an officer or other agent to receive return vetoes during such periods."

President Ford and Attorney General Levi accepted my recommendation and the announcement was made.

I have reviewed the analysis contained in my memorandum and continue to hold the views expressed there.

Respectfully,

Robert H. Bork

Robert H. Bork

RHB/jac

APPENDIX B

OFFICE OF THE SOLICITOR GENERAL,
Washington, DC, January 26, 1976.

January 26, 1976

MEMORANDUM TO THE ATTORNEY GENERAL

FROM: SOLICITOR GENERAL RHB

RE: POCKET VETOES

Recommendations: (1) We recommend that the Attorney General be authorized to make the following public announcement on behalf of the President:

> President Ford has determined that he will use the return veto rather than the pocket veto during intra-session and inter-session recesses and adjournments of the Congress, provided that the House of Congress to which the bill and the President's objections must be returned according to the Constitution has specifically authorized an officer or other agent to receive return vetoes during such periods.

(2) In accordance with the position expressed in the foregoing announcement, we further recommend that the Department of Justice be authorized to accept judgment in Kennedy v. Jones, Civil Action No. 74-194 (D. D.C.).

This recommendation is based upon our analysis of constitutional policy as well as our estimate of the likely outcome of litigation. This memorandum first sets out a summary of its analysis and then in more detail discusses (1) the text and apparent policy of the Constitution, (2) pertinent judicial decisions, and (3) possible objections to our recommendations.

SUMMARY

The constitutional text limits the use of the pocket veto to circumstances in which Congress, "by their adjournment," has prevented use of the return veto. The constitutional question is, therefore, when does Congress' adjournment prevent the President from returning a bill with his objections. As a matter of pure logic, the answer to that question would be (1) during a recess when no agent of

the originating House is available to accept the return and (2) during the period following the final adjournment of one Congress and preceding the convening of another. In all other circumstances, Congress could consider the President's objections to the bill and complete the legislative process by sustaining or overriding the veto. Although the history of the Constitutional Convention sheds little further light on this matter, it is apparent that the Framers intended the President to exercise only a qualified negative over legislation and did not contemplate an expansive reading of the Pocket Veto Clause.

The judicial history of the Clause introduces some confusion, however. In The Pocket Veto Case, the Supreme Court sanctioned the use of the pocket veto during a long inter-session adjournment of Congress, when agents of the originating House were available, although not specifically authorized, to accept a return veto. But just nine years later, in Wright v. United States, the Court sanctioned the use of the return veto during a shorter intra-session recess of the originating House, and in doing so significantly, although in part implicitly, retracted much of its analysis in the earlier case. At a minimum, Wright stands for the proposition that a veto may be returned to an accredited agent of the originating House while that House is not in session. In Kennedy v. Sampson, the Court of Appeals for the District of Columbia Circuit extended the Supreme Court's reasoning in Wright to bar use of the pocket veto during a short intra-session adjournment of Congress. We believe that decision was correct. The Constitution requires the unsigned bill to be returned to the originating House; if, as in Wright, the temporary absence of the originating House does not prevent a return, we see no reason why the simultaneous absence of the nonoriginating House should change that result.

The case now pending in the District Court for the District of Columbia, Kennedy v. Jones, involves the use of pocket vetoes during (1) a somewhat longer (32-day) intra-session adjournment of Congress and (2) an inter-session adjournment. We do not believe that the length of the intra-session adjournment can be constitutionally significant under modern conditions, so long as an agent remains behind who is authorized and available to receive a return veto. Nor do we regard the difference between intra-session and inter-session adjournments to require a difference in constitutional practice; in both situations the same Congress that passed the bill would, upon reconvening, be able to consider the President's objections and determine whether they should be sustained or overridden; in those circumstances the return of the bill would not appear to have been prevented within the meaning of the Pocket Veto Clause.

I. Constitutional Text and Policy

The second paragraph of Article I, Section 7, of the Constitution provides in relevant part as follows:

> Every Bill which shall have passed the House of Representatives and the Senate, shall, before it becomes a Law, be presented to the President of the United States; If he approves he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law * * * If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in the like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law.

Were we construing the Constitution afresh, neither enlightened nor encumbered by later judicial gloss, it would appear obvious that the return veto is required in all cases where Congress has not made its use impossible. The normal course of interaction between a Congress and a President who disagree is prescribed as: legislation, return veto, attempt to override. The President thus has a qualified negative over legislative acts. The pocket veto exists solely to prevent Congress from depriving the President of that qualified negative and so leaving the legislative power completely unchecked.

The return veto requires Congress to muster a two-thirds majority to override. The pocket veto, by requiring Congress to reenact the legislation and then muster a two-thirds majority to override a subsequent return veto, thus requires congressional consideration of the same measure not two but three times before the President's qualified negative may be overcome. There can be no justification for placing that burden on the process except that Congress itself has made it inevitable by preventing the use of the return veto.

This said, it follows that the use of a pocket veto is improper whenever a return veto is possible. The pocket veto is not properly viewed, in the constitutional design, as a presidential prerogative; it is, rather, a narrowly limited

presidential defense to the exercise by Congress of the latter's own prerogative, "by their Adjournment," to prevent the return of an unsigned bill.

The constitutional question, then, is when is a return veto impossible, when does "Congress by their Adjournment prevent [a bill's] Return." The Constitution does not answer explicitly, but the plain indication that the return veto is heavily preferred and the practical construction that should be given the concept of impossibility argues that the pocket veto is proper in only two circumstances: (1) during an intra-session or inter-session recess when no officer or designated agent of the House in which the bill originated is available to accept the return; or (2) when a Congress, or either House of it, has finally adjourned so that the Congress that next meets will not be the same legislative body.

The procedures required (or not required) by Article I, Section 7, support these conclusions. The President is required to return the bill within ten days (Sundays excepted), but there is no time limit, express or implied, placed upon the obligation of the House to which the bill is returned to "enter the Objections at large on their Journal, and proceed to reconsider" the bill. This suggests that the length of an adjournment or recess is irrelevant to the question of whether a return or a pocket veto is appropriate. The relevant consideration is the ability of the President to make the return. (It is also true that only when a Congress has ended would it be impossible for a House to "proceed to reconsider.")

It has been contended that a return veto is impossible unless the originating House is in session. The constitutional text imposes no such requirement, however, and there is no apparent reason why it should be implied. The bill is required to "be presented to the President of the United States," but it has never been doubted that his agent at the White House may accept the presentation and that the President's ten days begins to run then, even if he does not return to the White House or even to the country during that period. There being no time limit upon the reconsideration of a vetoed bill by the originating House, there is even less reason to suppose that the return veto cannot be made to its officer or agent for action when that House reassembles.

Finally, it should be noted that the constitutional text does not prescribe a time limit for the period between the passage of a bill and its presentation to the President. Thus, were it supposed that the President had a power to pocket veto a bill because the tenth day fell during a recess or adjournment, Congress could defeat the power by leaving a bill with an officer instructed to present it to the President nine days before the end of any recess or adjournment.

This fact reduces the argument for the power to pocket veto during intra-session or inter-session recesses or adjournments to the level of constitutional triviality. The power would arise only by accident, oversight, or when Congress preferred a pocket veto to a return veto. These are not considerations that rise to the level of constitutional argument.

The legislative history of the veto provisions, though by no means conclusive, tends to confirm the argument from the text. There is abundant evidence from the proceedings of the Constitutional Convention, and from other sources, that the Framers viewed any veto as a limited exception to their basic legislative scheme according ultimate authority over the passage of federal legislation to the Congress. The absolute veto power that had been possessed by the King of England and by many of the colonial governors had been a major source of friction between the Colonies and England during the pre-revolutionary period, and efforts to confer a like power upon the President were expressly rejected by the Framers. See 1 M. Farrand, The Records of the Federal Convention of 1787 (1937 ed.), at pp. 104, 106; 2 M. Farrand, at pp. 71, 200, 301, 582, 585.

At the same time, however, the Framers were apparently convinced that the power to enact laws for the governance of the Nation was of too great a magnitude to allow it to be given to the legislative branch without any checking or balancing provisions. They therefore conferred upon the President the power to exercise a "qualified negative" (see the Federalist, No. 69) over proposed legislation, a negative requiring the Congress to reconsider bills of which the President disapproved but which could be overridden by a two-thirds majority of both Houses. The history of the clause thus clearly counsels a narrow construction of the occasions for its exercise (see e.g., 1 J. Story, Commentaries on the Constitution of the United States §891 (5th ed., 1905). This view of the veto as a qualified negative does not support an expansive view of the scope of presidential power to use the pocket veto.

II. Judicial Decisions

The Supreme Court has addressed the scope of the Pocket Veto Clause on only two occasions -- in The Pocket Veto Case, 279 U.S. 655 (1929), and Wright v. United States, 302 U.S. 538 (1938). Since on neither occasion did the Court undertake an exhaustive examination of the circumstances in which use of the pocket veto would be constitutionally appropriate, many questions are left open to debate. Moreover, some of the Court's rationale in The Pocket Veto Case appears

inconsistent with the text and history of the relevant constitutional provisions and, indeed, with some of the Court's rationale in the subsequent Wright decision.

Although the holding in The Pocket Veto Case might well be affirmed were the Court presented in the future with a case involving the same facts, we do not believe -- given the significantly different approach to the Pocket Veto Clause embraced in Wright -- that the Court's original rationale would survive intact. Indeed, portions of that rationale were either directly or indirectly rejected in Wright. The Court's opinion in the latter case strongly suggests, in our judgment, that the Supreme Court would not presently approve the use of a pocket veto during a temporary adjournment of the Congress so long as (1) appropriate arrangements had been made by the originating House for the receipt of presidential messages during the adjournment and (2) the length of the adjournment did not exceed the lengths of adjournments that have become typical in modern times. We think it likely, moreover, that the Court might drop the second factor, i.e., that the length of the adjournment might be held irrelevant and thus not a reason for allowing the use of a pocket veto.

A. The Pocket Veto Case. The Supreme Court held in The Pocket Veto Case that the inter-session adjournment of both Houses of the 69th Congress, which lasted for approximately five months, had prevented the President from returning with his objections a bill that had been presented to him eight days before the adjournment. The Court thus rejected the contention made by the petitioners and the amicus curiae that the President's failure to return the bill to the Congress, with his objections, within ten days of its having been presented to him had resulted in its having become a law without his signature.

The principal factors relied upon by the Court in support of this holding were that (1) the word "House" appearing in the second paragraph of Article I, Section VII, of the Constitution requires that the House in which the bill originated be "in session" on the tenth day following the bill's presentation to the President, and that appointment by that House of an officer or other agent authorized to receive presidential messages during the adjournment therefore would neither prevent the President from exercising a pocket veto nor empower him to exercise a return veto after the originating House had adjourned; (2) the return of a bill disapproved by the President during an inter-session adjournment of the Congress would produce precisely the sort of delay in the bill's final disposition, and uncertainty concerning its status prior to Congress' having reconvened, that the relevant constitutional provisions were designed to

prevent; and (3) the use of a pocket veto in the circumstances presented by the case was consistent with "the practical construction that has been given to [the relevant provisions] by the President through a long course of years, in which the Congress has acquiesced" (279 U.S. at 688-689).

If extended to its logical conclusion, the reasoning employed by the Court in The Pocket Veto Case would have led ultimately to the conclusion that whenever the originating House is in recess at the end of the tenth day (excluding Sundays) following presentation of a bill to the President, the withholding by the President of his signature would prevent the bill from becoming a law. This conclusion would have followed without regard to the brevity of the recess, the availability of reliable and efficient means of returning the bill to the originating House with the President's objections, or the willingness of the Congress as a whole promptly to reconsider the bill following its return. Thus, had the originating House recessed simply for the afternoon of the tenth day following the presentation of a particular bill, the logic of the Court's reasoning in The Pocket Veto Case would have required it to sustain the President's pocket veto.

The only alternative would be to make the veto's effectiveness turn upon the length of the recess, but this would require the Court arbitrarily to assign a limit to the length of a recess during which a return veto could be required. There is no warrant for such a procedure in the Constitution.

B. Wright v. United States. The petitioner in Wright attempted to take advantage of the logic of the Court's reasoning in The Pocket Veto Case, and contended that a particular bill had become a law because (1) it had been return vetoed by the President during a three-day intra-session recess taken by the Senate, the originating House, and (2) no pocket veto could have been exercised during that period since Congress as a whole had not adjourned within the meaning of the phrase "unless the Congress by the Adjournment prevent [the bill's] return." In rejecting these contentions, the Supreme Court pointed out that if a messenger may "present" a bill to the President while the President is temporarily absent from the White House and if the same bill may be returned by messenger to the originating House with a statement of the President's objections, the "plainest practical considerations" suggest that the return veto may be received by "an accredited agent" of the originating House (302 U.S. at 590). The Court also noted that the dangers it had apprehended in The Pocket Veto Case, stemming from delay in the final disposition of a bill disapproved by the President and undertainty concerning its status following the return veto, are illusory when the originating House has taken "a mere temporary recess" (id. at 595).

Although the Court in Wright did not expressly disavow any part of the opinion in The Pocket Veto Case, it did feel compelled to repeat Chief Justice Marshall's admonition "'that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used . . .'" (id. at 593). As Justice Stone, who would have held that the President's failure to sign the bill in question had prevented its becoming a law, noted in his concurring opinion (which was joined by Justice Brandeis), however, the Court's opinion in Wright reflected a significantly different approach to the Pocket Veto Clause than had been employed in The Pocket Veto Case (see id. at 598-609). Specifically, (1) the Court held in Wright that the President's return veto had been effective despite the fact that at the time of the return the originating House was not "in session"; (2) it approved the return of a vetoed bill to "an accredited agent" of the originating House, even though that House had not specifically authorized an agent to receive return vetoes during the recess and despite the Court's statement in The Pocket Veto Case that "the delivery of the bill [being returned] to [an] officer or agent, even if authorized by Congress itself, would not comply with the constitutional mandate" (279 U.S. at 684); and (3) it refused to permit its decision to be influenced by past executive or congressional practice, noting that "[t]he question now raised has not been the subject of judicial decisions and must be resolved not by past uncertainties, assumptions or arguments, but by application of controlling principles of constitutional interpretation" (302 U.S. at 597-598). Wright undercut much of the rationale of The Pocket Veto Case and left the law in some confusion.

C. Kennedy v. Sampson. A close reading of the Supreme Court's opinions in The Pocket Veto Case and in Wright reveals a rather dramatic shift of emphasis in the latter in favor of essentially practical considerations. This shift of emphasis figured significantly in the recent decision of the Court of Appeals for the District of Columbia Circuit in Kennedy v. Sampson, 511 F. 2d 430 (1974). The court of appeals held in Kennedy that the Christmas recess taken by both Houses of the 91st Congress had not prevented the President from exercising return vetoes during that period and that the President's failure to sign or to return veto a particular bill during the recess had resulted in the bill's having become a law without his signature. The court relied heavily upon the practical considerations discussed in Wright in concluding that neither the length of the Christmas recess (five days for the originating House, as opposed to the three days involved in Wright), nor the fact that (unlike the situation in Wright) both Houses of the Congress were in recess on the tenth day (excluding Sundays) following presentation of the bill to the President, had empowered the President to exercise a pocket veto.

The court of appeals began its analysis "with the premise that the pocket veto power is an exception to the general rule that Congress may override presidential disapproval of proposed legislation" (511 F. 2d at 437). The Pocket Veto Clause was thus viewed as "limited by the specific purpose[s] it [was] designed to serve" (ibid.); the court reasoned that the clause was to be construed in a manner that frustrated neither of the "fundamental purposes" that had been identified by the Supreme Court in Wright (id. at 438; quoting from Wright, supra, 302 U.S. at 596):

> (1) that the President shall have suitable opportunity to consider the bills presented to him, and (2) that the Congress shall have suitable opportunity to consider his objections to bills and on such consideration to pass them over his veto provided there are the requisite votes. * * *

The only aspect of the rationale of the decision in The Pocket Veto Clause not modified by the decision in Wright concerned the constitutional significance of delay in a bill's final disposition and public uncertainty regarding its status prior to Congress' having reconvened. The court of appeals in Kennedy brushed this consideration aside, noting that, "[p]lainly, intrasession adjournments of Congress have virtually never occasioned interruptions of the magnitude considered in the Pocket Veto Case" and that "[m]odern methods of communication make it possible for the return of a disapproved bill to an appropriate officer of the originating House to be accomplished as a matter of public record accessible to every citizen" (511 F. 2d at 411). The court concluded that use of the return veto during an intra-session adjournment would create no intolerable public uncertainty (ibid.; footnotes omitted):

> [The] return of a bill during an intra-session adjournment * * * generates no more public uncertainty than does the return of a disapproved bill while Congress is in actual session. The only possible uncertainty about this situation arises from the absence of a definitive ruling as to whether an intrasession adjournment "prevents" the return of a vetoed bill. Hopefully, our present opinion eliminates that ambiguity.

The court of appeals left little doubt in Kennedy that it would hold that the President is not constitutionally empowered to pocket veto proposed legislation during an intra-session recess, whatever its length, so long as the originating House had authorized an officer or other agent to

receive presidential messages during its absence. Since we can not perceive any basis in constitutional text or policy for distinguishing between an intra-session recess and an inter-session adjournment, we believe that that court would extend its holding to inter-session adjournments as well.

Although we were somewhat troubled by the breadth of the court of appeals' opinion in Kennedy, for a variety of reasons we determined not to petition for a writ of certiorari in that case. First, the result in the case seemed to us to be unquestionably correct. Consequently, were we to have sought further review we would have been in the untenable position of agreeing with the actual holding in the case and with much of the court's reasoning, and of asking the Supreme Court merely to disapprove certain dicta. Second, it was our understanding that, by the time the decision in the Kennedy case was issued, executive policy with respect to pocket and return vetoes either accorded with that decision or would be modified accordingly. And, finally, we regarded the case to be a particularly inappropriate vehicle for presenting to the Supreme Court the question of congressional standing to sue -- a question the Court obviously would have had to reach prior to dealing with the merits of the case.

D. Pending Litigation. Although pocket vetoes have been used many times during intra-session and inter-session adjournments (see The Pocket Veto Case, 279 U.S. at 690-691; Kennedy v. Sampson, 511 F. 2d at 442-445), there have been very few cases challenging the constitutionality of the practice. A partial explanation for this is that development of the doctrine of congressional standing to sue is a relatively recent phenomenon. We may expect litigation with congressmen over every future use of the pocket veto during an adjournment that is not final. Such cases are particularly poor vehicles for litigating the question of congressional standing to sue. The Supreme Court might be greatly tempted to hold that there is standing in order to reach the veto issue and settle it. The dispute concerning congressional standing will, in the long run, pose a much more serious threat both to traditional executive prerogative and to constitutional modes of goverance than does acceptance of a narrowed scope for the pocket veto power -- particularly since Congress can completely frustrate the use of the pocket veto during other than final adjournments by the simple expedient of delaying the presentation of bills until their return dates coincide with times when the originating House, or both Houses, are scheduled to be in session.

We therefore believe that judgment on the merits should be accepted in Kennedy v. Jones, Civil Action No. 74-194 (D. D.C.) -- a suit filed by Senator Kennedy and involving two pocket vetoed bills. The first bill (H.R. 10511) would have amended the Urban Mass Transportation

Act of 1964 to permit buses purchased pursuant to that Act to be used to provide charter bus services. The bill was pocket vetoed by President Nixon during the sine die adjournment of the 1st Session of the 93d Congress, which lasted 29 days. The second bill (H.R. 14225) would have amended the Vocational Rehabilitation Act by extending the authorization of appropriations for certain programs for the handicapped for one year, making certain changes in federal programs for blind persons and providing for the convening of a White House Conference on Handicapped Individuals. President Ford pocket vetoed the latter bill during a 32-day intra-session recess taken by both Houses of the 93d Congress. The Congress subsequently passed bills identical to those that had been pocket vetoed, and they were ultimately signed into law, so that nothing of any significance other than legal issues is now at stake.

We therefore argued in Kennedy v. Jones that that case is moot. That argument has failed. We must now accept judgment and make the recommended public announcement on behalf of the President or continue to litigate the case. If we litigate, we are certain to lose both the standing issue and the pocket veto issue in the court of appeals. Nothing would be gained by litigating further unless we went to the Supreme Court. Either we or Senator Kennedy may attempt to bypass the court of appeals by petitioning the Court for certiorari before judgment. The case could be argued as early as next October. In any event, we believe we would run a very substantial risk of losing the congressional standing issue in the Supreme Court in this context and, if we did, would almost certainly lose the pocket veto issue. Further litigation risks much for very little prospect of gain.

III. Possible Objections to Restricting Use of the Pocket Veto to Final Adjournments of the Congress

Several possible objections have been raised to the recommendation that the President use pocket vetoes only upon the final adjournment of a Congress if, during all other recesses and adjournments, agents have been designated to receive return vetoes. The more important of these objections are analyzed here.

A. The decided cases support a distinction between intra-session recesses and inter-session adjournments, making it inadvisable for the President to surrender the power to pocket veto proposed legislation during inter-session adjournments.

We cannot perceive any basis in constitutional text or policy for distinguishing between an intra-session recess and an inter-session adjournment. The Court suggested in Wright that the determining factor so far as the permissibility of a pocket veto is concerned is the length of time the originating House is scheduled to be absent from its chambers, the consequent delay in the bill's final disposition, and public uncertainty concerning the bill's status prior to Congress' having reconvened. In recent years, however, inter-session adjournments have not consistently or significantly exceeded intra-session recesses in length. Indeed, the intra-session recess involved in Kennedy v. Jones was slightly longer than the inter-session adjournment in that case, which would make it particularly futile to urge the distinction suggested.

B. Although the President might not be "prevented" from returning a bill if only one House has temporarily recessed or adjourned, the temporary absence of both Houses might be held to prevent the bill's return.

The Supreme Court did state in Wright that, since the House of Representatives (the non-originating House in that case) had remained in session during the three-day recess taken by the Senate, the "Congress" had not adjourned and thus prevented "by their Adjournment" the return of the bill in question within the period prescribed for that purpose. But that observation was not accorded controlling weight by the Court since it simultaneously reserved the question whether a one-House recess longer in duration than the recess involved in that case would "prevent" the return of a vetoed bill. As Justice Stone pointed out in his concurring opinion in Wright, moreover, "it was the adjournment of the originating house with which the framers were concerned" (302 U.S. at 606). See also Kennedy v. Sampson, supra, 511 F. 2d at 440.

The distinction between a recess by one House and a recess by both is, in any event, of no particular significance if the important factors are, as those who make this point assume, the length of the recess and the unavailability of an originating House in session to receive a return veto.

C. Since the Supreme Court's holding in Wright was limited to disapproving a pocket veto exercised during a three-day recess, and the Court did not in that case disavow the discussion in The Pocket Veto Case concerning the constitutional significance of the delay and uncertainty inhering in longer recesses and adjournments, the President should continue to pocket veto bills of which he disapproves during congressional absences in excess of three days.

We believe that this objection was answered persuasively by the court of appeals in Kennedy v. Sampson. The recesses and adjournments taken by the Congress during recent years have not approached in length those taken at the time The Pocket Veto Case was decided. Moreover, the Congress may delay the presentation of an enrolled bill to the President until near the end of even a very long recess or adjournment -- and then need not reconsider the disapproved bill within any given period of time or, indeed, at all.

Finally, until the Congress has reconsidered the disapproved bill, and either sustained or overridden the President's veto, there will be public uncertainty concerning whether the bill will become a law. That uncertainty is no greater than in cases where Congress dawdles over the original passage of a bill or over an attempt to override a return veto. Indeed, it is hard to see what public uncertainty has to do with the issue at all. In the case of a return veto during a recess or adjournment, the public knows the bill has not become law and will not unless and until Congress overrides. Why that is of any concern, much less a factor of constitutional dimensions, remains a mystery. The Supreme Court mentioned it once but the argument about uncertainty will not withstand analysis. We therefore do not think the fact that an accredited agent of the originating House may have to hold a returned bill for a short period of time prior to the reconvening of the originating House has any significance under the Pocket Veto Clause.

D. Requiring the originating House specifically to authorize an officer or other agent to receive return vetoes during the temporary absence of that House from its chambers has no predicate in the text of the relevant constitutional provisions and does not distinguish earlier cases or practice.

The principal difficulty that must be faced in any attempt presently to delimit the scope of the Pocket Veto Clause is that the Supreme Court has complicated the inquiry with opinions

that are not completely reconcilable and, as a consequence, past executive practice with respect to return and pocket vetoes has not been entirely consistent. It is true that the Secretary of the Senate, to whom the Court held in Wright an effective return of the President's veto had been made during the Senate's three-day absence, had not been specifically authorized by the Senate to receive such vetoes. That fact obviously poses a problem in using the specific designation of an agent as a limiting principle for purposes of the Pocket Veto Clause. We also agree that, were determination of the scope of the Pocket Veto Clause a matter of first impression, the designation of an agent would be unnecessary if officers of the originating House were available.

We nevertheless believe that the chances are quite good that the Supreme Court would endorse the specific designation of an officer or other agent to receive return vetoes as a means of distinguishing past executive practice (and avoiding the resurrection of bills long since regarded as having been effectively pocket vetoed) and of providing guidance for the future. Clearly, a case-by-case determination of the effectiveness of pocket and return vetoes -- depending upon the length of the particular recess or adjournment -- would be entirely unsatisfactory. An approach to the Pocket Veto Clause requiring the Court to endorse a recess or adjournment of a specific length as permitting the President to return veto a bill would be both inconsistent with the Court's normal practice and exceedingly difficult to rationalize. Specific designation of an agent by the originating House at least evidences an effort by that House to keep open lines of communication with the President during temporary absences, and provides formal assurance that the Congress as a whole will receive formal notification upon its return of decisions made by the President with respect to specific legislation.

E. A determination by the President that he will return rather than pocket veto bills presented to him during temporary recesses and adjournments may result in the resurrection of bills pocket vetoed in the past.

Since we believe that the Supreme Court would refuse to recognize the effectiveness of a pocket veto exercised during a temporary recess or adjournment no longer in duration than those that have become common in recent years, so long as an officer or agent had been authorized by the originating House to receive presidential messages during that period, the danger that bills pocket vetoed in the past may suddenly spring to life confronts us regardless of present or future executive policy with respect to pocket vetoes. An attempt should be made promptly to identify bills that may be affected by various alternative theories of the Pocket Veto Clause, although we believe that the Supreme Court

would view sympathetically an argument that any future decision by it concerning the scope of the Pocket Veto Clause should be applied prospectively only.

F. A construction of the Pocket Veto Clause prohibiting the President from pocket vetoing bills during a temporary recess or adjournment creates a danger that the circumstances attending the President's decision to return veto a particular bill will have changed dramatically by the time the Congress has reconvened.

Since the Constitution does not place any limits upon the Congress' power to delay the presentation of an enrolled bill to the President, the danger that circumstances may change between the time of the President's consideration of a bill and Congress' reconsideration of that bill is unavoidable.

G. It is unrealistic to believe that the President can adopt the position that pocket vetoes are impermissible except following a final adjournment of the Congress without destroying the ability of his successors to assert the contrary.

We agree that a practice of using return vetoes instead of pocket vetoes will make it more difficult for a later President to use pocket vetoes. If the use of return vetoes is the sounder constitutional practice, however, that is not an objection but a proper result. The significance of this consideration is, in any case, substantially undermined by the very probable outcome of a Supreme Court test of the scope of the Pocket Veto Clause.

Appendix C

Office of the Attorney General,
Washington, DC, January 29, 1976.

The President,
The White House, Washington, DC.

Dear Mr. President:

The Department of Justice is presently involved in a case which raises the question whether a President may lawfully use a pocket veto during intra-session and inter-session adjournments of Congress. That case, Kennedy v. Jones, is now pending in the District Court for the District of Columbia and concerns two bills which were pocket vetoed, the first by President Nixon during the sine die adjournment of the 1st Session of the 93rd Congress, which lasted 29 days, and the other by you during a 32-day intra-session recess taken by both Houses of the 93rd Congress. The bill pocket vetoed by President Nixon would have amended the Urban Mass Transportation Act of 1964 to permit buses purchased pursuant to that Act to be used to provide charter bus services. The bill which you pocket vetoed would have amended the Vocational Rehabilitation Act in connection with certain programs for the handicapped. Congress has since passed bills identical to the bills which were pocket vetoed, and they have been signed into law.

After extensive consideration of the issue, and based on an examination of the judicial decisions construing the Pocket Veto Clause of the Constitution and the policy behind it, I have concluded that it is extremely unlikely that we will prevail in our contention that the bills involved in the Kennedy case were lawfully pocket vetoed. In addition, I am of the opinion that continued use of the pocket veto during intra-session and inter-session recesses or adjournments, where the appropriate House of Congress has specifically authorized an officer or agent to receive return vetoes during such periods, cannot be justified as consistent with the provisions of the Constitution. I therefore recommend that the Department of Justice be authorized to accept judgment on the merits in the Kennedy case, and also that I be authorized to make the following statement on your behalf:

> President Ford has determined that he will use the return veto rather than the pocket veto during intra-session and inter-session recesses and adjournments of the Congress, provided that

the House of Congress to which the bill and the President's objections must be returned according to the Constitution has specifically authorized an officer or other agent to receive return vetoes during such periods.

Because of the importance of this issue, I am attaching the memorandum of the Solicitor General discussing in detail the legal basis for my recommendation, the problems posed by continuation of the Administration's present policy regarding the pocket veto, and the possible objections to my recommendation. The Department's position may be summarized as follows:

The Pocket Veto Clause of the Constitution, Art. I, Sec. 7, provides that the pocket veto may only be used in cases in which the Congress, "by their Adjournment," has prevented the use of the return veto. Such cases would appear to exist only (1) during a recess when no agent of the originating House is available to accept the return, or (2) during the period following the final adjournment of one Congress and preceding the convening of another. In all other cases, Congress would in fact be able to consider the President's objections and complete the legislative process by overriding or sustaining the veto. This construction is in accord with the clear intent of the Framers that the President exercise only a "qualified negative" (See the Federalist, No. 69) over proposed legislation, and not the "absolute negative" implicit in the pocket veto. It is also in accord with the original and limited purpose of the Pocket Veto Clause -- to enable the President to veto a bill in those extraordinary cases where Congress seeks to deprive him of the veto power by adjourning and thus preventing the return of an unsigned bill.

Although the judicial decisions construing the Clause are less than satisfactory, they nevertheless appear to support the above position. In the Pocket Veto Case, the Supreme Court approved the use of a pocket veto during a five-month inter-session adjournment of Congress, when agents of the originating House were available, although not specifically authorized, to accept a return veto. But later in Wright v. United States, the Court, although approving the use of a return veto during a shorter intra-session recess of the originating House, established that a veto may be returned to an accredited agent of the originating House even if it is not in session. Recently, in Kennedy v. Sampson, the Court of Appeals for the District of Columbia Circuit construed the Supreme Court's decision in Wright to bar use of the pocket veto during a short intra-session adjournment of Congress.

It is our view that the Kennedy v. Sampson decision was correct, and that the Supreme Court would not presently approve the use of a pocket veto during a temporary adjournment of the Congress if appropriate arrangements had been made by the originating House for the receipt of presidential messages during the adjournment.

There would not appear to be any advantage in continuing to maintain our present position regarding pocket vetoes in the Kennedy v. Jones case. As I have mentioned, our chances of success are remote, and our position is not constitutionally sound. Moreover, continuation of the litigation may risk an adverse decision on the question of congressional standing, an issue also presented by the case. There is the danger that the Court's desire to reach the merits of the case may constitute an irresistible temptation to decide the standing question in favor of Senator Kennedy. Since this later issue is of considerable importance, it would seem advisable to await a more favorable case on the merits from the Executive's position before presenting the congressional standing issue to the Court.

I would, of course, be glad to discuss this matter with you. Because of the status of the litigation, it is important that this matter be decided as soon as practicable.

Sincerely,

EDWARD H. LEVI,
Attorney General.

NUMERICAL SUMMARY OF BILLS VETOED, 1789 - 1989
(Through Second Reagan Administration)

President	Congresses Coincident with terms	Regular Vetoes	Pocket Vetoes	Total Vetoes	Vetoes Overridden
Washington	1, 2, 3, 4	2		2	
John Adams	5, 6			0	
Jefferson	7, 8, 9, 10			0	
Madison	11, 12, 13, 14	5	2	7	
Monroe	15, 16, 17, 18	1		1	
J.Q. Adams	19, 20			0	
Jackson	21, 22, 23, 24	5	7	12	
Van Buren	25, 26		1	1	
W. Harrison	27			0	
Tyler	27, 28	6	4	10	1
Polk	29, 30	2	1	3	
Taylor	31			0	
Fillmore	31, 32			0	
Pierce	33, 34	9		9	5
Buchanan	35, 36	4	3	7	
Lincoln	37, 38, 39	2	5	7	
A. Johnson	39, 40	21	8	29	15
Grant	41, 42, 43, 44	45	48	93	4
Hayes	45, 46	12	1	13	1
Garfield	47			0	
Arthur	47, 48	4	8	12	1
Cleveland	49, 50	304	110	414	2
B. Harrison	51, 52	19	25	44	1
Cleveland	49, 50	42	128	170	5
McKinley	55, 56, 57	6	36	42	
T. Roosevelt	57, 58, 59, 60	42	40	82	1
Taft	61, 62	30	9	39	1
Wilson	63, 64, 65, 66	33	11	44	6
Harding	67	5	1	6	
Coolidge	68, 69, 70	20	30	50	4
Hoover	71, 72	21	16	37	3
F. Roosevelt	73, 74, 75, 76, 77, 78, 79	372	263	635	9
Truman	79, 80, 81, 82	180	70	250	12
Eisenhower	83, 84, 85, 86	73	108	181	2
Kennedy	87, 88	12	9	21	
L. Johnson	88, 89, 90	16	14	30	
Nixon	91, 92, 93	26	17	43	7
Ford	93, 94	48	18	66	12
Carter	95, 96	13	18	31	2
Reagan	97, 98, 99, 100	39	39	78	9
TOTALS		1419	1050	2469	103
(Percentages)		(57.4)	(42.6)	(100%)	(7.3%)

SOURCES: *Presidential Vetoes, 1789-1976* (Gov't Printing Off., 1978 [compiled by Senate Library]); *Presidential Vetoes, 1977-1984* (Gov't Printing Off., 1985) [compiled by Senate Library]); data since 1984 compiled by Senate Library.

POCKET VETOES 1789-1989
(Through the Second Reagan Administration)

President	Total Pocket Vetoes	Intra-Session Pocket Vetoes	Inter-Session Pocket Vetoes	Pocket Vetoes After Final Sine Die Adjournment
Madison	2		2	
Jackson	7		5	2
Van Buren	1			1
Tyler	4		2	2
Polk	1			1
Buchanan	3		1	2
Lincoln	5		2	3
A. Johnson	8	4	4	
Grant	48		7	41
Hayes	1			1
Arthur	8		6	2
Cleveland	110		32	78
B. Harrison	25	1	12	12
Cleveland	128	2	22	104
McKinley	36		3	33
T. Roosevelt	40		9	31
Taft	9		5	4
Wilson	11		5	6
Harding	1		1	
Coolidge	30		8	22
Hoover	16	1	3	12
F. Roosevelt	263	10	92	161
Truman	70	39	10	21
Eisenhower	108	20	33	55
Kennedy	9		2	7
L. Johnson	14	2	3	9
Nixon*	17	4		13
Ford	18			18
Carter	18			18
Reagan	39		2	37
TOTALS	1,050	83	271	696
(Percentages)	(100%)	(7.9%)	(25.8%)	(66.3%)

*excludes two attempted pocket vetoes by Nixon, one inter-session, one intra-session, later invalidated by courts

SOURCES: Extrapolated from Presidential Vetoes, 1789-1976 (Government Printing Office, 1978 [compiled by U.S. Senate Library]); Presidential Vetoes, 1977-1984 (Government Printing Office, 1985 [compiled by U.S. Senate Library]); data on vetoes since 1984 obtained directly from U.S. Senate Library.